Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior Design Workers Union v Warren Concrete Limited (Employment and Labour Relations Cause E085 of 2022) [2025] KEELRC 866 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 866 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E085 OF 2022

JW KELI, J

MARCH 14, 2025

BETWEEN

KENYA CONCRETE, STRUCTURAL, CERAMIC TILES, WOOD PLYS AND INTERIOR DESIGN WORKERS UNION ..... CLAIMANT

AND

WARREN CONCRETE LIMITED ..... RESPONDENT

JUDGMENT

Issues in dispute

Refusal of the respondent to deduct and remit union dues to members of the claimant.

Refusal by the respondent to recognize the claimant's union.

1. The claimant is a trade union registered according to the provisions of *Labour Relations Act*. Aggrieved by the refusal of the respondent to deduct and remit trade union dues from employees it had it had recruited as members filed a statement of claim dated 31st January 2022 and received in court on the 14th February 2022 seeking the following reliefs:-

    a. That the Honourable Court be pleased to direct the respondent to comply with the mandatory provisions of sections 48&54 of the *Labour Relations Act*, No. 14 of 2007, Laws of Kenya, with regard to trade unions.

    b. Directing the Respondent to sign a formal recognition agreement with the claimant union to commence CBA negotiations with the claimant union within 30 days from date of signing of the recognition agreement.

    c. Directing the respondent to desist from intimidating and forcing the members of the applicant to withdraw from the union.

d. That this Honourable Court be pleased to grant such orders or reliefs as it deems fit and just in the circumstances.

e. That the cost of this suit be borne by the Respondent.

2. In addition to the claim the claimant union filed its list of documents as produced in the affidavit of Dishon Angoya sworn on the 31st January 2022 namely:-

1. Copy of the claimant's registration certificate.

2. Copy of FORM 'S'

3. Copy of *Legal Notice No. 50 of 2014*

4. A letter reporting trade dispute

5. Conciliator's findings and recommendations

6. Dismissal letter of employees

Response

3 The respondent entered appearance through the Federation of Kenya Employers filed a statement of defence dated 28th March 2023 and produced the recognition agreement it had with a rival union Kenya Quarry and Mine workers and a collective barging agreement signed with the Concrete Quarry Owners Group of FKE.

Hearing

4. The parties agreed to proceed by way of documents and written submissions. Both parties filed.

Issues for determination

5 The claimant in submissions addressed the merit of their claim on union deductions and remittance.

6. The respondent raised the following issues in the dispute:-

a) Whether the claimant had recruited a simple majority of the Respondent's employees, thereby acquiring the right to be recognized by the respondent

b) Whether the Claimant union is entitled to receive any union dues from the Respondent

c) Whether it is practical to implement a new collective bargaining agreement (CBA) with the Claimant union, given that the Respondent already has a valid and existing CBA with the Quarry Workers Union

d) Whether the Claimant union is likely to be suffer prejudice due to the non-recognition and failure to remit union dues by the Respondent

7. The court having perused the pleadings and submissions by the parties was of the considered opinion that the issues for determination in the claim were :-

a. Whether the claim for union dues deductions and remittance by the claimant was merited

b. Whether the claim for recognition was merited.

Whether the claim for union dues deductions and remittance by the claimant was merited

The Claimant's submissions

8. The Claimant contended that the Respondent's employees exercised their rights and joined the union. The claimant had recruited 117 unionisable employees of the respondent which translated to the simple majority and above. The respondent had refused to remit the union dues of the members of the claimant under the mandatory provisions of section 48 of the *Labour Relations Act* and as per the submitted FORM 'S' and the claimant's bank account contained in *Legal Notice No. 50 of 2012* dated 8th May 2024.

9. The Claimant submitted that the respondent had disregarded the conciliator's findings and recommendations of the conciliation dated 29th November 2021 for deductions and remittances of trade union dues in favour of the claimant union. The claimant relied on the provisions of sections 48 and 50 of the *Labour Relations Act* on the deductions and remittance of union dues. further on section 19 of the *Employment Act* on deductions of wages.

10. It was the claimant's case the respondent was in violation of the fair labour prcatse under Article 41 of *The Constitution* by failing to comply with the provisions of sections section 48 and 50 of the *Labour Relations Act* and section 19 of the *Employment Act* on deduction of wages. The claimant relied on several authorities which the court perused.

Respondent's submissions

11. On whether the Claimant union is entitled to receive any union dues from the Respondent, Section 48 (3) of *Labour Relations Act* provides the threshold for deduction of trade union dues by an employer as it states that; "An employer in respect of whom the Cabinet Secretary 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." The Respondent averred that the allegations that it refused to deduct and remit union dues are inaccurate primarily because no employee served a notice to resign from the current interested party's union as provided in section 48(6) of the *Labour Relations Act* as below:-

> " An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union."

12. The Respondent asserted that it presently has a duly signed Recognition Agreement and CBA with the Interested Party's Union. The Respondent is therefore obligated to adhere to the existing CBA and remit trade union dues to the current union for its members. That based on a misapprehension of facts, the Claimant union wrongly argued in its written submissions that *the Constitution* of Kenya, Legal Notice No. 50 dated 8th May 2014 and check off forms grants it the authority to receive union dues from the Respondent. Article 41(2) (c) of *the Constitution* of Kenya grants Kenyan workers the right to join or participate in the activities of a trade union. The Respondent submitted that the Claimant union cannot argue that the Respondent had violated this right without presenting evidence to support its claim, especially considering that some unionisable employees are members of the current union. The Respondent therefore cannot infringe on a right it is not a party to.

13. Similarly, the Claimant union cannot arbitrarily determine that the blanket order issued under the Legal Notice applies to the Respondent, as it contravenes the provisions of the *Labour Relations Act*

on the procedure that ought to be followed before the remittance of union dues. This position is specifically provided in the *Interpretation and General Provisions Act*. The case of Su*mba & 4 others v Independent Electoral & Boundaries Commission & another (Constitutional Petition E435 of 2022*) [2022] KEHC 13196 (KLR) similarly affirms the issue of inconsistency between subsidiary legislation and Acts of Parliament and stated as follows:-

> "Sections 2, 29 and 31(b) of the *Interpretation and General Provisions Act* amplified the need of harmony in meanings between the parent Act and a subsidiary legislation. The law abhorred inconsistencies. The only instance where the law allowed any variance was where the parent Act expressly stated that the subsidiary legislation was to provide to the contrary. No subsidiary legislation shall be inconsistent with an Act of Parliament."

In this instance, the conciliator's recommendation on the Respondent partly remitting dues on the non-contested members of the Claimant union is also not in line with the *Labour Relations Act*.

14. The Respondent asserted that the alleged members of the Claimant union have the option of directly remitting trade union dues to secure their representation. That a clear reading of Section 52 of the *Labour Relations Act* provides as follows;

> "Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by *the constitution* of the trade union directly to the trade union."

Additionally, in the case of Kenya Private Universities Workers Union *v Mount Kenya University (Cause 117 of 2020*) (2024) KEELRC 665 (KLR)4 which held that;

> "If the Claimant has recruited members from the Respondent institution, those members can conveniently remit their trade union subscriptions directly to the Claimant. It is not prudent to compel the Respondent to collect trade union dues on behalf of the Claimant, while the Respondent apprehends that the Employees have not given authority to the Respondent to deduct and remit trade union dues, and more so when there are documents at the heart of the dispute, upon which the grant of authority to deduct rests, which are alleged to be forged. The Respondent would be exposed to claims by Employees, for illegal salary deductions and damages for contractual breach. It would be exposed to claims of acting on forged documents, to violate the statutory protections accorded to the employees salaries under sections 17-19 of the *Employment Act*."

15. On the Claimant's union submission that the Respondent is obligated to remit retrospective union dues from the date the check-off forms were submitted, the Respondent contended that this argument is misguided and unlawful, as there is no obligation compelling the Respondent to do so. It relied on the case of Lochab Brothers Limited v Transport Workers Union (Civil Appeal 46 of 2020) (2024) where it stated as follows;

> "In the instant case, the appellant was not convicted for failing to pay the deducted wages nor was it liable to remit any deductions. The evidence on record reveals that the appellant did not deduct a cent from his employees. Therefore, to retrospectively order payments for amounts that have not been deducted is unjust, unfair and wholly inexcusable. In our view an employer cannot be saddled with the liability to pay the employees' contribution from its own funds for the retrospective period, since they have no corresponding right to deduct the same from the future wages payable to the employees."

In light of the foregoing, the Respondent maintained that it was not obligated to remit trade union dues and the Claimant union's demand is therefore unfounded.

Decision on union deductions and remittance

16. The Court recognized the right of the employees to join a union and to enjoy the benefits of unionization offered by the union which include representation at the shop floor and collective bargaining. The right is anchored in international law, *the Constitution* of Kenya and statutes. See Article 8 International Covenant on Economic, Social and Cultural Rights which states:-

> " 1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;" ;

The International Labour Organization Convention 87 (1948), Right to Organize and Collective Bargaining: Convention 98 (1949); Article 41 of *the Constitution* to wit:

> " 1) Every person has the right to fair labour practices.
>
> (2) Every worker has the right—
>
> (a) to fair remuneration;
>
> (b) to reasonable working conditions;
>
> (c) to form, join or participate in the activities and programmes of a trade union; and
>
> (d) to go on strike.
>
> (3) Every employer has the right—
>
> (a) to form and join an employers organisation; and
>
> (b) to participate in the activities and programmes of an employers organisation.
>
> (4) Every trade union and every employers' organisation has the right—
>
> (a) to determine its own administration, programmes and activities;
>
> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining."

The *Labour Relations Act* section 4 to wit:-

> " 4. Employee's right to freedom of association (1) Every employee has the right to — (a) participate in forming a trade union or federation of trade unions; (b) join a trade union; or and section
>
> 5. Protection of employees
>
> (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act."

The Court must enforce the foregoing rights in its application of the law.

17. The foundation of the relationship between workers and unions is membership fees as envisaged under section 48 of the *Labour Relations Act* to wit:-

> " 48.1) In this Part "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership."

The procedure of membership is then prescribed under the section as follows:-

> " 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.
>
> (4) The Minister may vary an order issued under this section on application by the trade union.
>
> (5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.
>
> (6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.
>
> (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.'' (emphasis given)

18 The Court holds that by failing to make deductions after receipt of Check-off forms of the members of the claimant, the respondent was in violation of the constitutional right of the employees to unionise and benefit from their membership to the union . Article 41 of *the Constitution* provides for labour rights as follows:-

" 1) Every person has the right to fair labour practices.

(2) Every worker has the right— (a) to fair remuneration; (b) to reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike.

(3) Every employer has the right— (a) to form and join an employers organisation; and (b) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.''

The right is also anchored in international law as stated above.

19. The court found no viable reason had been advanced by the Respondent on the non-deduction of the dues and remittance to the union. Once FORM S is received by the employer and the union has complied with the provisions of section 48 of the *Labour Relations Act* (supra) the employer has no choice but to comply. The respondent having received the Check-off Form(S) it ought to make the union deductions as authorised by the Minister(Legal Gazette Notice) and remit to the union dues for all its current employees members. The employer has a duty to notify the union of any member employee who is no longer in its employment. Once the employee has given authority to deduct salary for union dues the employer has no right to qualify the choice until the employee resigns from the union. Section 19 of the *Employment Act* reads:-

" 19. Deduction of wages

1. Notwithstanding section 17(1), an employer may deduct from the wages of his employee—(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages; (4) An employer who deducts an amount from an employee's remuneration in accordance with subsection (1)(a), (f), (g) and (h) shall pay the amount so deducted in accordance with the time period and other requirements specified in the law, agreement court order or arbitration as the case may be.''

The dispute was before the conciliator and there was no finding by the conciliator that the members of the claimant who had signed the check off forms were members of another union no was evidence

produced to support the allegations. The employee is free to join any union of choice. The existing union does not hold its members as property and they are free to leave. The employer does not act as a gatekeeper for the existing union. The court upheld the position by Rika J in the case of Kenya Private Universities Workers Union v Management *University of Africa (Cause 605 of 2020*) (2021) eKLR where the learned judge held that;

> " To sustain its right as the sole collective bargaining agent, given by Recognition Agreement, the Union must continue to recruit, to always have a majority of Unionisable Employees at the relevant workplace. Rival Unions in the industry may recruit from the same workplace, achieve higher numbers than those enlisted by the existing Union, and seek invalidation from the National Labour Board, of recognition granted to the existing Union." (emphasis given).

The court is satisfied that the claimant has demonstrated it deserved an order to compel deduction and remittance of union dues as per submitted check-off forms 'S".

20. The prayer on arrears of undeducted union dues is rejected as the dues are deducted from wages of the employee according to section 48 of the *Labour Relations Act* (supra) and cannot be backdated without the consent of the employee. There was no such consent before the trial court. The court rejects the invitation to order payment of arrears of any undeducted union dues from the coffers of the Respondent.

Whether the Claimant had recruited a simple majority of the Respondent's employees, thereby acquiring the right to be recognized by the Respondent

21. Section 54(1) of the *Labour Relations Act* on the threshold for the recognition of trade union provides as follows: "(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."

Claimant's submissions

22. The claimant's case was that it had recruited 117 unionisable employees of the respondent by way of check off system since 1st August 2021. That it met the simple majority and shared a draft recognition agreement with the respondent on the 5th August 2021 and proposed for commencement of negotiations of CBA under section 54 of the *Labour Relations Act*.

Respondent's submissions

23. The Respondent averred that it has 204 unionisable employees, out of which 78 employees are permanent whereas 129 are on fixed contract terms. The Respondent submitted that the Claimant union lacked the requisite locus standi to demand recognition from the Respondent, a single member of the Concrete Quarry Owners Group for want of meeting the threshold to recruit a simple majority of unionisable employees in the concrete quarry owners' group who are party to the current CBA between the Respondent and Interested Party. A strict reading of section 54(1) and 54(2) of the *Labour Relations Act* requires the Claimant union to demonstrate recruitment of a simple majority from each of the other employers in the same sector as a prerequisite to recognition by the Respondent. The Claimant Union did not demonstrate that it has recruited unionisable employees from the other

members of the Group to entitle it the right to be accorded recognition. The above parameter, with due respect to the claimant Union, is one, failure to comply with which it would render the substratum of the claim untenable with the consequence that the same be dismissed with costs.

24. On the substantive reference to recognition and the parameters, the Respondent relied on the case of Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Kudheiha) v British Army Training Unit Kenya (2015) eKLR'; "Recognition' is qualified here. 'Recognition' of a union 'for purposes of collective bargaining' is on condition that such a union; first represents the simple majority and secondly; such majority is from unionisable employees. The two must work together but can be separated in that even where the union is able to get a simple majority, such a majority may not comprise a unionisable groups or that there is a unionisable group that fails to meet a simple majority."

25. On whether it is practical to implement a new CBA with the Claimant Union, given that the Respondent already has a valid and existing CBA with the Quarry Workers Union the Respondent pointed out that the check-off forms submitted by the Claimant Union include certain overlapping members whose details could not be verified to confirm which union the employee belongs to. The Respondent cited that the ILO Recommendation on Collective Bargaining Recommendation 1981 (No. 163) (read together with the ILO Convention on the Right to Organise and collective bargaining encourages voluntary negotiation between employers and trade unions. Notably, if the Claimant union had been diligent, it would have followed up on resignations of the overlapping members in its check off forms in accordance with Section 48(6) of the *Labour Relations Act* to meet the criteria of majority representation. The Respondent asserted that it should not be subjected to an action contradictory to the due process of the law and relied on the decision by Justice Rika in the case of Kenya Private Universities Workers Union v Management *University of Africa (Cause 605 of 2020)* (2021) eKLR (supra). The respondent stated that once the Claimant union meets the prerequisite of representing the majority number of unionisable employees then the Respondent will have no objection to signing a Recognition Agreement and engaging in negotiations on matters concerning its employees' interests.

Decision

26. The court noted that there was a finding by the conciliator that the claimant had not met the threshold of simple majority under section 54 of the *Labour Relations Act*. The union had focused on fixed-term contract employees and not the permanent category(DA-5). Further the Respondent pleaded that it already had in place a recognition agreement dated 10th January 2014 with a rival union, the Kenya Quarry and Mine Workers Union (appendix 1). The respondent also produced a Collective Bargaining Agreement with the said rival union signed with Concrete Quarry Workers Group of FKE.

27. Section 54 of the *Labour Relations Act* States:- ''(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.'; The law is silent on what happens where there is an existing union holding a CBA with the employer. I was persuaded by the decision of Justice Rika in the case of Kenya Private Universities Workers Union v Management *University of Africa (Cause 605 of 2020)* (2021) eKLR where the learned judge held that; "To sustain its right as the sole collective bargaining agent, given by Recognition Agreement, the Union must continue to recruit, to always have a majority of Unionisable Employees at the relevant workplace. Rival Unions in the industry may recruit from the same workplace, achieve higher numbers than those enlisted by the existing Union, and seek invalidation from the National Labour Board, of recognition granted to the existing

Union." (emphasis given). The claimant once it is satisfied, it meets the simple majority ought to apply to the National Labour Board and seek invalidation of the existing recognition agreement.

Conclusion

28. The claim is allowed and Judgment is entered in favour in the Claimant against the Respondent as follows: -

    A. That the respondent is hereby directed to make deductions and continue deductions and remitting the Union dues as per the authority to deduct from its employees who may have subscribed to become members of the Claimant's Union per the Check-off Forms in place.

    B. The Court awards the claimant reasonable costs payable by the respondent to cover the expenses in the litigation which the court awards at an all-inclusive figure of Kshs. 20,000 to be paid within 30 days of this Judgment.

29. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Claimant Angoya

Respondent – Ms Okelo h/b Ouma