



**Bakery Confectionery Food Manufacturing & Allied Workers Union (K) v Everest Industries Limited & another (Cause E476 of 2024) [2025] KEELRC 1104 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1104 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E476 OF 2024**

**CN BAARI, J**

**APRIL 4, 2025**

**BETWEEN**

**BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED  
WORKERS UNION (K) ..... CLAIMANT**

**AND**

**EVEREST INDUSTRIES LIMITED ..... 1<sup>ST</sup> RESPONDENT  
CONSOLIDATED HUMAN RESOURCES SOLUTIONS LTD 2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination are two of the Claimant/Applicant's motions, the first one is dated 24<sup>th</sup> June, 2024 brought pursuant to Rule 17 (5) of the Employment & Labour Relations Court (Procedure) Rules 2016, Sections 5(1) and (2) (c), 48, 74 (a) of the [Labour Relations Act](#), 2007 and Section 87 of the [Employment Act](#), 2007, and the second is dated 27<sup>th</sup> November, 2024.
2. Under the motion of 24<sup>th</sup> June, 2024, the Applicant seeks orders THAT: -
  - i. The Respondent be restrained by way of an order of injunction from victimizing the Applicant's members and/or from perpetrating any further acts or forms of victimization, from coercing any of the Claimant's members to recant membership, from interfering with their employment status, terms and conditions of employment and/or from undertaking any acts of prejudice aimed or targeted at the Claimant/Applicant's members for reasons of engaging in trade union activities.
  - ii. The Respondent be restrained from locking out, and/or denying any of the Applicant's members access to the workplace for the performance of their duties under their respective employment contracts.



3. In the motion of 27<sup>th</sup> November, 2024, the Applicant seeks the joinder of the proposed 2<sup>nd</sup> Respondent to these proceedings, and leave to amend the claim as per the attached amended Memorandum of claim.
4. The two motions are supported by the grounds on the face and the affidavits sworn by one Danchael Mwangure.
5. The crux of the motion of 24<sup>th</sup> June, 2024 is that in exercise and furtherance of its Constitutional rights and those of its members as guaranteed under Articles 36 and 41 of *the Constitution*, the Applicant recruited 45 of the Respondent's employees into its membership, and duly forwarded check off forms to the Respondent for deduction of trade union dues in line with the relevant provisions of the law.
6. The Applicant avers that after achieving simple majority in line with Section 54 of the *Labour Relations Act*, it scheduled a meeting vide a letter dated the 10<sup>th</sup> June 2024 to execute a recognition Agreement with the Respondent. It states further that upon arrival at the Respondent's premises, the Human Resource Manager of the Respondent intimated that the Director of the Respondent was not in the office and undertook to revert within 3 days to propose an alternative date for signing of the Recognition Agreement, but which he failed to do.
7. That the Respondent has instead, resorted to locking out employees who had joined the Applicant union for no apparent reason and forcing employees to execute contracts with an outsourcing agency, which contracts the said employees have not gained sight of, and which is intended to illegally transfer their employment to a stranger despite having worked for the Respondent for substantial periods of time.
8. The Applicant avers that the actions of the Respondent are aimed at victimizing the Applicant's members and to circumvent the unionization process through unfair labour practices which seek to disenfranchise the Applicant's members and their legitimate interests. It states further that so far, 13 union employees whose names and affidavits are appended to the supporting affidavit have been locked out for failing to execute such unlawful contracts and continue to be denied access to the workplace.
9. It is the Applicant's position that the Respondent has initiated whimsical, unprocedural and indiscriminate disciplinary proceedings targeted at employees who have subscribed their membership with the Applicant herein, and such acts constitute victimization in violation of the provisions of Section 5(2) (c) of the *Labour Relations Act*, 2007 as read with Articles 36 and 41 (2) (c) of *the Constitution*.
10. The Applicant avers that vide a letter dated 21<sup>st</sup> June 2024, it reported a trade dispute to the Minister pursuant to Section 62 of the *Labour Relations Act*, 2007 over refusal by the Respondent to sign a recognition agreement and victimization and perpetration of unfair labour practices in violation of Section 5(3) of the *Employment Act* read with Article 36 and 41 (2) of *the Constitution* of Kenya, and deduction and remission of trade union dues.
11. It states further that despite the pendency of the said trade dispute, it is apprehensive that the Respondent will continue perpetrating its unlawful victimization and termination of union members, and therefore moves this court to secure a protective order as sought on the face of the application pending the determination of the dispute before the conciliator, or until further orders of this court.
12. It avers further that neither the appointed conciliator nor the Cabinet Secretary has any powers to issue any interim protective orders or relief to secure or protect the interest of the Applicant's members while disputes are being ventilated, and that it is only fair that this court pronounces itself and grants interim protective reliefs even as parties pursue conciliation or until such further orders as the court may deem fit to impose.



13. That it is in the interest of justice that this Honorable Court issues the orders sought.
14. The Respondent opposed the motion vide a replying affidavit sworn by Joseph Gichanga Ndungu on 11<sup>th</sup> July, 2024. He avers that the Applicant imagines a non-existent trade dispute or claim and has only caused disunity leading to strained working relationships at the Respondent's plant.
15. It states that it manages a workforce comprising of 34 permanent employees and 66 casual laborers, out of which at least 20 have been absorbed by an HR Firm.
16. The Respondent states that due to the nature of its business, the need for human capital is conditioned on production capacity, sales volume, job order and availability of raw materials among other production factors. It avers that for this reason, it keeps majority of its workforce on casual arrangements mainly outsourced from a contracted Human resource firm.
17. The Respondent further avers that in order to streamline and to install sound human resources management system, the Respondent has contracted Consolidated Human Resource Solutions Limited to outsource its casual employees, and has since absorbed about 15 of its casual employees.
18. The Respondent states that the Applicant is dishonest as it has not attained statutory majority as per Section 54 of the Labour Relation Act No 14 of 2007. That 15 out of the 45 referenced individuals have since withdrawn their signatures with the Applicant, alleging that they were duped by the Applicant on ground that they were joining "savings chama"
19. It states that it has not locked out 13 of Applicant's members out of malice, but transiting to human capital sourced from the outsourcing firm. That out of the 13 individuals, two (2); Patrick Mutua and Nehemiah Korir, are on permanent terms and have been advised to proceed on accrued leave.
20. It states that what it is doing is to progressively align its human resources management functions by engaging the services of an outsourcing firm, and that the Applicant's attempt to seek injunctive reliefs to stop the ongoing realignment of human resource management through a court process, is an absurdity and abuse of legal process.
21. The Respondent prays that the Applicant's Notice of Motion dated 24<sup>th</sup> June, 2024 be dismissed with costs to the Respondent and the interim order vacated.
22. In a further affidavit filed by the Applicant, it states that the allegation that the Respondent has 34 permanent employees, and 66 casual employees is not factual or backed by any evidence tabled before the Court. That the Claimant has not attached any payroll or muster roll to back the said allegations.
23. The Applicant avers that as at the time of recruiting the Respondent's employees forming the subject matter of these proceedings, the Respondent had a total of 52 employees working in both managerial and unionisable cadres of employees. It states further that out of the 52 employees, 7 employees are shown to be occupying management or managerial positions and that the union recruited 45 employees thus far representing 100% of all unionisable workforce in line with the provisions of Section 54 of the Labour Relations Act, 2007.
24. It avers further that the contention by the Respondent that 20 of the 66 employees have been absorbed by an HR firm confirms the Claimant's contentions that the Respondent sought to interfere with terms and conditions of unionisable employees upon joining the union.
25. The Applicant further states that immediately the Respondent was served with check off forms where all of its directly engaged union members joined the union in the exercise of their Constitutional rights spelt out under Article 36 and 41 of the Constitution, the Respondent hurriedly executed a purported



staff outsourcing service agreement with the proposed 2<sup>nd</sup> Respondent dated the 15<sup>th</sup> of June 2024 where the Respondent purported to direct all its regular employees to execute contracts with the proposed 2<sup>nd</sup> Respondent.

26. The Applicant avers that all employees including those recruited by the Claimant union were forced to execute illegal fixed term contracts with the proposed 2<sup>nd</sup> Respondent as a condition to accessing the workplace, and that all employees who declined to execute such contracts continue being locked out from the workplace to date.
27. Parties canvassed both motions by way of written submissions, and submissions were received from both parties and have been duly considered.

### **Determination**

28. I have considered the two motions, the grounds and affidavits in support, the replying affidavits in opposition, the further affidavit by the Applicant together with the rival submissions. The issues for determination are:
  - i. Whether the Applicant's motion of 24<sup>th</sup> June, 2024 has merit
  - ii. Whether the proposed 2<sup>nd</sup> Respondent should be joined to this proceeding
  - iii. Whether the Applicant should be allowed to amend the claim
29. What the Applicant seeks in the motion of 24<sup>th</sup> June, 2024 is an order of injunction restraining the Respondent from victimizing her members and/or from perpetrating any further acts or forms of victimization, coercing the members to recanting membership as well as interfering with their employment status, terms and conditions of employment for reasons of engaging in trade union activities.
30. Hon. Justice Rika granted this order at the interim stage on 27<sup>th</sup> June, 2024, and further directed parties to subject themselves to conciliation, which parties have now confirmed to have been concluded. The issue then, is whether this Court should confirm this order pending determination of the main suit.
31. The Applicant's case is that immediately the Respondent was served with check off forms where all its unionisable members joined the union in exercise of their Constitutional rights spelt out under Article 36 and 41 of *the Constitution*, the Respondent hurriedly executed a purported staff outsourcing service agreement with the proposed 2<sup>nd</sup> Respondent dated 15<sup>th</sup> June 2024, where the Respondent purported to direct all its regular employees to execute contracts with the proposed 2<sup>nd</sup> Respondent.
32. The Respondent on its part, states that what it is doing is to progressively align its human resources management functions, by engaging the services of an outsourcing firm.
33. It is evident from the documents before this court that the Respondent took steps to transfer employees it had in her service either as casual labourers or permanent employees to the Human Resources Firm at the time the Applicant union had already recruited, and was in the process of entering into a recognition agreement.
34. The Court construes these actions of the Respondent as meant purely to defeat and frustrate the participation of its workers in union activities, having moved to transfer her workers immediately meetings to discuss execution of a recognition agreement were scheduled.
35. The Respondent has further admitted that the HR firm, which is also the proposed 2<sup>nd</sup> Respondent herein, has since absorbed some of her employees, without telling the court the terms of such



- absorption and whether the employees were consulted prior to being transitioned to a different employer.
36. Further, keeping of employee records is an obligation that the *Employment Act*, 2007 places at the door step of the employer. The Respondent has not produced in evidence its muster payroll to show that the employees the Applicant recruited were not in their service and if transferred, the manner, terms and conditions of such transfer.
  37. It is therefore apparent that as submitted by the Applicant, the Respondent is in a rush to transition employees, most of whom are members of the Applicant in a bid to scuttle their participation in the activities of the Applicant union, contrary to the express provision of Article 41 of *the Constitution*.
  38. This Court is alive to the fact that employment relationships or work engagements can take diverse arrangements, including a triangular model where the owner of the work does not directly employ the worker, as it happens in outsourcing, and which is what the Respondent seeks to do in the instant case. (See Havi v *Judicial Service Commission & another (Petition E039 of 2024)* [2024] KEELRC 798 (KLR)).
  39. Further, in the case of *Wrigley Company (EA) Ltd v AG & 2 others & Another Petition 22 OF 2012 (2013) eKLR* the Court held that employers are not expected to outsource their core functions; is not permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees; an employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee, and that in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect and finally that outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.
  40. In light of the foregoing, the Respondent has not demonstrated good faith in transiting her employees to the proposed 2<sup>nd</sup> Respondent, which confirms the Applicant's fears that the actions of the Respondent are motivated by the Applicant's members association with the Applicant/Claimant's union.
  41. For the reasons foregone, I find the Applicant/Claimant's motion merited.

#### **Whether the proposed 2<sup>nd</sup> Respondent should be joined to this proceedings**

42. On the motion for joinder, the Respondent has admitted that it outsources its employees from a Human Resources Firm, and has expressly mentioned Consolidated Human Resource Solutions Limited as the HR firm from which it outsources.
43. The Respondent has further confirmed that it is in the process of transitioning her employees to the service of the proposed 2<sup>nd</sup> Respondent, and which without doubt places it at the center of the dispute before this court. For this reason, the need for joinder of the proposed 2<sup>nd</sup> Respondent has been sufficiently justified and is hereby allowed.
44. Having allowed the prayer for joinder of a party, it follows that the prayer to amend the claim should similarly be allowed to allow the Claimant, firstly to join the new party and secondly, to spell out its case as well as the reliefs it seeks as against the now 2<sup>nd</sup> Respondent in the suit.
45. In the final analysis, the motions are allowed in the following terms: -
  - a. That the Respondent be and is hereby restrained by way of an order of injunction from victimizing the Applicant's members and/or perpetrating any further acts or forms of



victimization, from coercing any of the Claimant's members to recant membership, interfering with their employment status, terms and conditions of employment for reasons of engaging in trade union activities.

- b. That the Respondent be and is hereby restrained from locking out, and/or denying any of the Applicant's members access to the workplace for the performance of their duties under their respective employment contracts.
- c. That the proposed 2<sup>nd</sup> Respondent, Consolidated Human Resource Solutions Limited, be and is hereby joined to this proceedings.
- d. That the Applicant/Claimant is granted leave to file and serve an Amended Memorandum of Claim and to do so within 21 days of this order.
- e. That costs shall abide the cause.

46. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Nduati h/b for Mr. Amalemba for the Claimant/Applicant

Mr. Kipruto Present for the Respondent

Ms. Esther S-C/A

