



Kenya Union of Commercial Food & Allied Workers v Gusii Water & Sanitation Co Ltd (Cause E046 of 2024) [2025] KEELRC 1503 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1503 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E046 OF 2024**

**JK GAKERI, J
MAY 20, 2025**

**BETWEEN
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT
AND
GUSII WATER & SANITATION CO LTD RESPONDENT**

JUDGMENT

1. The claimant union commenced the instant suit vide a Memorandum of Claim filed on 31st May, 2024 alleging non-payment of union dues.
2. It is the claimant's case that it approached the respondent's employees who voluntarily signed check off sheets as proof of membership of the union and the respondent commenced deduction of union dues but stopped and the amount accumulated to Kshs.1,821,800.00 though on 7th December, 2018, 3rd January, 2019 and 11th February, 2019, the respondent paid part of the amount outstanding.
3. The claimant avers that it had a Recognition Agreement with the respondent dated 2nd February, 2015.
4. That the dispute was referred to conciliation and the conciliator made findings and recommendations.

The claimant prays for:

- i. An Order directing the respondent to pay Kshs.1,823,848.00.
- ii. An Order directing the respondent to continue deducting and remitting monthly union dues.
- iii. Any other Order the Court may deem fit to meet the cause of justice.
- iv. Costs of the suit.



Respondent's case

5. The respondent denied the existence of a Recognition Agreement with the claimant union or having made union deductions or owing any unmerited dues.
6. The respondent's response was basically that its employees had since moved on to another union namely; Kenya Union of Water and Sewerage Employees (KUWASE) with which it had a CBA and to which it was remitting union dues and union membership was voluntary and the union had filed Kisumu ELRC CAUSE NO. E 003 of 2022 to harass the respondent to remit union dues.
7. On cross-examination, Mr. George Obongo confirmed that the two parties had related since 2015 and the sum of Kshs.1.8 million comprised unpaid union dues.
8. The witness admitted that the memorandum of claim neither identified the names of the alleged union members or the amount to be remitted in respect of each employee nor the year or month when the amount fell due.
9. On re-examination, the witness testified that the letter dated 20th September, 2023 had a tabulation of the amounts due and was received by the respondent on 21st September, 2023.

Respondent's evidence

10. Mr. Stephen Bosire Rosana confirmed, on cross-examination that the parties had a Recognition Agreement and by the time it was concluded, the respondent had about 100 employees and was deducting their union dues and remitting the same to the claimant but stopped when employees moved from the claimant union to KUWASE. The witness further admitted that union resignation letters were not forwarded to the union and only filed copies of payslips for 2024 showing that union dues had been deducted on behalf of KUWASE.
11. According to the witness, the employees resigned in December 2020, but the respondent had not filed any document on remittance of union dues from 2015 to 2020.
12. The witness admitted that there was an outstanding balance owing due to financial constraints and should be paid as it was lawful to do so, but could not tell when the amount owed would be paid.
13. The witness admitted that he had neither seen nor perused the letter sent to the Managing Director of the respondent but agreed that it was not responded to.
14. Finally, the witness admitted having seen the conciliators recommendations and maintained of being aware of the outstanding balance.

Claimant's submissions

15. As to whether the respondent owed the claimant union dues, the claimant union submitted that the respondent abandoned the conciliation process and the conciliator made recommendations which the union urged the court to uphold.
16. The union submitted that its efforts and attempts to procure payment had not borne any fruit and RWI had admitted that the respondent owed the claimant union dues.
17. As to whether the respondent should continue deducting and remitting union dues to the claimant, the union submitted that the respondent did not provide evidence as to how many of its employees had joined KUWASE and no evidence was adduced to demonstrate that the respondent should not continue deducting and remitting union dues to the claimant.



18. Finally, the union submitted that based on the evidence on record its case merited and the respondent did not challenge, the conciliator's recommendation.

Respondent's submission

19. As to whether the respondent owed the claimant union dues counsel for the respondent submitted that it did not owe the sum of Kshs.1,821,800.00 as alleged having paid the sum of Kshs.50,800.00 by cheques, to urge that it was unclear whether in light of the payment any amount was outstanding.
20. Counsel submitted that the claimant's claim lacked particulars of the employees and months in dispute and it was unclear how the figure of Kshs.1,821,800 was arrived at.
21. Reliance was placed on the sentiments of the court in Hahn V Singh [1985] KLR 716 for the proposition that special damages must be specifically pleaded and strictly proved as were those in Nizar Virani t/a Kisumu Beach Resort V Phoenix of East Africa Co. Ltd to urge that the claimant failed to avail evidence of the alleged union dues owed but only pleaded a figure. That although RWI admitted that the respondent owed the claimant union dues, the amount was uncertain as neither party had the evidence. That the debt was neither specifically pleaded nor strictly proved.
22. As to whether the respondent should continue deducting and remitting dues to the claimant union, counsel submitted that the respondent's employees are former members of the claimant union and are currently unionized with KUWASE as confirmed by RWI and the respondent had a valid Collective Bargaining Agreement (CBA) with KUWASE and the claimant had not pleaded the number and identity of the employees in respect of whom union dues were to be deducted.
23. Reliance was made on the sentiments of the court in Kenya Nut Co. Ltd V Kenya Plantation & Agricultural Workers Union Ltd & another on recognition agreements to urge that none of the employees of the respondent were members of the claimant union.
24. Finally, counsel submitted that the fact that the respondent's employees did not terminate their union membership procedurally cannot supersede their right to voluntary union membership.

Analysis and determination

25. It is common ground that the claimant union and the respondent had a Recognition Agreement and union dues were deducted and remitted regularly until 2016 when the respondent started defaulting and based on the evidence on record, ceased to remit and letters were exchanged as evidenced by the union's letter dated 12th September, 2023.
26. It is also not in dispute that the issue of unpaid/non-payment of union dues by the respondent was reported to the Cabinet Secretary Ministry of Labour and Social Protection vide letter dated 24/10/2023 and a conciliator was appointed (Mr. Etyang) who shared a report with the parties vide letter dated 16th January, 2024.
27. The conciliator noted that the respondent failed to attend all meetings and did not file a response.
The instant suit was filed on 31st May, 2024.
28. As regards unpaid union dues, which the claimant union pleads that it was owed the sum of Kshs.1,821,800, it also admits that it was paid some money on 7th December, 2018, 3rd January 2019 and 11th February, 2019 which is an admission that union dues were outstanding as RWI admitted on cross-examination.



29. For unexplained reasons the claimant union did not disclose how much it received or whether the payment reduced the amount claimed.
30. Deduction of union dues is regulated by the provisions of Section 48 of the *Labour Relations Act* and the amount deducted by the employer is payable into a specified account of the trade union or in specified proportions into specified accounts of a trade union.
31. Although the respondent denied having concluded a Recognition Agreement with the claimant on 2nd February, 2015, RWI confirmed that there was a Recognition Agreement and could not sustainably deny owing union dues to the claimant.
32. Significantly, the admission by the respondent's witness that the respondent owed the claimant unremitted union dues embellished the claimant's case save for the amount due.
33. The pith and substance of the claimant's case is that the respondent owes it unremitted union dues from 2016 to 2023 a sum of Kshs.1,821,821.00 or Kshs.1,823,848.00 or Kshs.1,821,000 as per the written witness statement.
34. In effect the claimant is suing for a debt owed by the respondent on account of unremitted union dues.
35. Regrettably, neither the Memorandum of Claim dated 29th May, 2024 nor the written witness statement of Mr. George Obongo contains particulars on how the amount of Kshs.1,821,800.00 or 1,823,848.00 or 1,821,000 came about and crystalized as a debt. Mr. George Obongo admitted that the Memorandum of Claim lacked particulars of the names of the employees involved month, year or the amount owed from each employee.
36. Needless to belabour, union membership is dynamic and it behooved the claimant to avail documentary evidence of its records as to whom its members were at a given time, how much was payable to it and how much was not paid. Without such particulars, the sum claimed remains just that, a sum or figure with no supportive evidence for sustainability.
37. It requires no gainsaying that the operative mantra is that he who alleges or asserts must prove those allegations.

Section 107 of the *Evidence Act* provides:

38.
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
39.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Relatedly, Section 108 provides:

40. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Finally, Section 109 of the *Evidence Act* provides:

41. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



42. In *East Africa Produce (K) Ltd V Christopher Astiado Osiro* Civil Appeal No. 43 of 2001 the Court of Appeal held:
- “It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was laid in the case of *Kiema Mutuku V Kenya Cargo Handling Services* [1991]...”
43. See also *Alice Wanjiru Ruhiu V Messiac Assembly of Yahweh* [2021] eKLR, *Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & another* [2005] IEA 334, *Halsburys Laws of England 4th Edition Volume 17* paragraph 13 & 14, *Muriungu Kinoru Jeremiah V Stephen Ungu M’warambua* [2015] eKLR, *Charterhouse Bank Ltd (Under statutory Management) V Frank Kamau* [2016] eKLR, *Mbuthia Macharia V Anna Ndwiga & another* [2017] eKLR *Christopher Nyaru Kagina V Esther Mbandi Keguna & another* [2016] eKLR and *Urmila w/o Mahandra Shah V Barclays Bank International Ltd & another* [1979] eKLR among others.
44. According to a letter dated 20th September, 2023 by the claimant to the respondent, received by the respondent on 21st September, 2023, the respondent owed the claimant union dues from 2016 to 2023 amounting to Kshs.1,821,000.00 and the sum of Kshs.80,800 had been received by cheque. It is unclear as to when the amount was received and related to which year.
45. As correctly submitted by the respondent’s counsel, this is a claim for special damages which must be pleaded and proved.
46. In *Jogoo Kimakia Bus Services Ltd Electrocom International Ltd* [1992] KLR 177, the Court of Appeal held *inter alia*
- “... special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts Set out in the pleadings. They must be specifically pleaded”.
47. See also *Joseph Kipkorir Rono V Kenya Breweries Ltd & another Kericho HCCA No. 45 of 2000 Kimaru J (as he then was), Gulhamid Mohamedaji Jivanji V Sanyo Electrico Co. Ltd* Civil Appeal No. 225 of 2001 [2003] eKLR, *Coast Bus Services Ltd V Sisco E. Murunga N’danyi & 2 others* Civil Appeal No. 192 of 1992, *Hahn V Singh* (*supra*).
48. Without availment of particulars to prove how the amount claimed was arrived at, namely; number of unionized employees whose deductions were due and when, it is an arduous responsibility for the claimant to sustain a claim such as this one.
49. The claimant’s witness statement is reticent on how the sum was arrived at.
50. Strangely, and for unexplained reasons, the claimant union only took decisive action in 2023 but is claiming arrears of union dues for 2016, 7 years later.
51. Flowing from the foregoing, it is the finding of the court the claim for Kshs.1,821,000 as union dues by the claimant to the respondent is unproven.
52. A demand letter is not sufficient evidence to prove that the amount demanded is necessarily owed or the amount demanded is the correct amount.
53. In a court setting the debt or amount claimed must be proved evidentially.



54. The fact the respondent did not file records of its employees did not lessen the claimant's burden of proof, such evidence would have been necessary if the claimant had availed evidence of its membership over the 7 year period, which the union did not.
55. Under Section 48(6) of the *Labour Relations Act*, 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.
56. However, the provisions of Section 48(8) of the Act require the employer to forward a copy of the notice of resignation to the trade union. This sub-section is couched in mandatory terms but the employer is not obligated to deduct union dues from such an employee.
57. Although the respondent's case is founded on the contention that its employees had shifted loyalty and moved to KUWASE and RWI's written statement states that the two have a CBA, the respondent is silent on when KUWASE counter balanced the claimant union and entrenched itself. When for instance was the CBA concluded? How many members does the new union have among the unionisable employees of the respondent?
58. These details are important because the copies of pay slips on record are for 2024 only.
59. Although an employee has the constitutional right to join and exit a trade union, both are formal processes and resignation must be in writing. It is thus ascertainable how many unionized employees of the respondent had decamped to KUWASE.
60. Equally important, however, the claimant union ought to have availed data as to who its members were till the date of filing the instant suit.
61. Notably, even though the claimant's union's Recognition Agreement with the respondent is still valid in law, the union cannot claim entitlement to continued deduction of union dues by the respondent from unidentifiable members. It was incumbent upon the claimant to demonstrate who its members in 2015, 2016, 2017, 2018, 2020, 2021, 2022 and 2023, as none of the members or shop steward has sworn an affidavit that they have been denied union representation or forced to join a rival union. Such evidence would have hugely amplified, the claimant's case as it would have affirmed the factual circumstances on union membership. The union was obligated to show how the alleged unremitted due accrued on a monthly basis.
62. The court cannot assume that the number of members of the claimant union remained the same, and in particular in the presence of a more aggressive and audacious union, a fact the claimant admits.
63. It is also puzzling that for the duration in question the claimant union did not conclude a CBA with the respondent notwithstanding, which is the purpose of a recognition agreement, more so because the respondent testified that it had a CBA with KUWASE in less than 3 years of engagement.
64. Flowing from the foregoing, it is clear that the claimant's suit for the sum of Kshs.1,823,000.00 as unpaid union dues is clearly unmerited.
65. Be that as it may, since the respondent admits that there is an outstanding balance of union dues, the respondent shall compute the same and pay the claimant.
66. Similarly, concerning the Order directing the respondent to continue deducting and remitting union dues, as adverted to elsewhere in this Judgment, for unexplained reasons, the claimant union did not adduce evidence to prove that its membership among the unionisable employees as the date of filing of the instant suit which would have demonstrated its continued relevance.



67. Significantly, since the claimant it was seeking an Order with prospective effect, it behooved the union to demonstrate that the Order had a foundation grounded on existing membership. This was not demonstrated. A feasible inference is that it had no subsisting membership among the unionsable employees of the respondent.
68. Consequently, the prayer for the Order that the respondent continue deducting and remitting union dues to the claimant union lacks merit and is disallowed.
69. The upshot of the foregoing is that the only orders that commend themselves are that:
- a. The respondent shall compute the outstanding unremitted union dues per year and pay to the claimant union.
 - b. The respondent shall reimburse the claimant's costs of Kshs.20,000.00.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 20TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

