



**Kenya Union of Commercial, Food and Allied Workers v Laxmi Hardware Limited
(Cause E060 of 2024) [2025] KEELRC 1469 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E060 OF 2024**

**JK GAKERI, J
MAY 19, 2025**

BETWEEN

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

AND

LAXMI HARDWARE LIMITED RESPONDENT

RULING

1. Before the court for determination is the applicant/claimant’s Notice of Motion dated 17th July, 2024, and filed on 18th July, 2024 under Certificate of Urgency seeking orders that:
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of this matter the Honourable Court be pleased to issue Orders restraining the Respondent from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant/Applicant’s members whose names appear on the checkoff sheets on account of their trade union membership.
 4. Costs of the Application be provided for.
2. The Notice of Motion is expressed under Section 12 of the Employment and Labour Relations Court Section 4, 48, 54 and 74 of the *Labour Relations Act* Section 87 of the *Employment Act* and the Employment and Labour Relations Court (Procedure) Rules, 2016 and is based on the grounds set forth on its face and the Supporting Affidavit of Benjamin Tangara sworn on 17th July, 2024 who deposes that he is the Branch Secretary of the claimant/Applicant responsible for recruitment, organization and co-ordination within Kisumu County, Siaya and Busia counties.



3. The affiant deposes that the applicant's Constitution and Rules permits it to recruit and enrol employees of hardware shops as its members, and had recruited 16 out of 17 of the respondent's employees as its members but its letters on check off forms and draft Recognition Agreement had not been responded to by the respondent necessitating the court's intervention.
4. That if the prayers sought are not granted, the claimant's members are exposed to danger of imminent victimization, threats and coercion because of union membership and quest for good labour practices.
5. According to the affiant, it is only by granting the orders sought herein that ends of justice will be met.

Respondents case

6. By a Replying Affidavit sworn on 8th April, 2025, Mr. Dhan Sukhbhai Ravjimbhai Varsani deposes that he is a director of the respondent company and the instant application was and abuse of court process as it was hinged on incorrect provisions of law.
7. That the respondent had no employees and person working at its facility are employees of a 3rd party by the name Sytamex Ventures Ltd who are their employer including the persons listed on the check off forms save, one Mr. Kevin Otiato Ondere who had since resigned and hence the respondent is wrongly enjoined in the suit.
8. That the applicant's constitution did not mention a hardware, but according to the claimant, a warehouse includes a hardware and the alleged employees of the respondent did not fall within the definition of a warehouse.
9. The affiant avers that the Recognition Agreement was never served on the respondent as there was no evidence of service and the application ought to be dismissed.
10. During the mention on 25th February, 2025, at Mr. Atela's instigation, parties agreed that the application be canvassed by way of written submissions and parties were accorded 14 days a piece to file and exchange submissions. The respondent was accorded 5 days to file a Replying Affidavit and a mention schedule for 7th April, 2025, when none of the parties appeared before the Deputy Registrar, necessitating the mention on 12th May, 2025 when both parties logged in late and a ruling date was given as 19th May, 2025.

Claimant's submissions.

11. The union argues that the respondent's employees could bargain for better terms individually in the absence of a Recognition Agreement, the enabler of collective bargaining and its denial by the respondent was an infringement of their constitutional rights under Articles 36 and 41 of the Constitution of Kenya, on freedom of association and fair labour practices.
12. That the respondent's exhibited high anti-union attitude and intended to source for a union for them and the court ought to intervene.
13. On the recognition agreement, the applicant submitted that the refusal by the respondent to respond was unlawful and unfair and no reason had been proffered by the respondent for the delay yet the applicant had attained the threshold for recognition under Section 54(1) of the Labour Relations Act.
14. That the respondent should recognise the union.
15. On union dues, reliance was placed on the provisions of Section 48 of the Labour Relations Act to urge that none of the respondent's employees had resigned or withdrawn from the union or given a notice to that effect.



16. The applicant submitted that only the grant of the orders sought would cushion and protect the respondent's employees from the respondent's anti-union and unlawful activities.
20. The applicant further submitted that the provisions of Sections 50 and 19(1) of the Labour Relations Act and Employment Act respectively provided for deduction of union dues from members wages or salary and the respondent should do so.
21. Puzzlingly, the applicant sought orders other than those prayed for in the instant application.

Respondent's submissions.

22. The respondent filed the Replying Affidavit on 10th April, 2025 but did not file submissions.

Analysis and determination.

23. The only issue for determination is whether the applicant's Notice of Motion dated 18th July, 2024 is merited.
24. Documents filed by the claimant union show that by letters dated 27th March, 2024 and 13th June, 2024, it forwarded a total of 16 names of the respondent's employees who had signed check off forms.
25. The letters requested the respondent to deduct Kshs.200 from each member's salary and remit the same to its account Number 0941822290 at Absa Bank Kenya PLC, Queensway House Branch or via Mpesa paybill Number 220832 under the Company's (Respondent) Account name.
26. In addition, the respondent was to deduct the sum of Kshs.150 from each employee to pay COTU (K) Account Number 110-7486 Kenya Commercial Bank, Moi Avenue Branch.
27. Both letters cited Legal Notice No. 77 of 5th January, 2022 dated 28th July, 2022 and No. 8912 dated 2nd September, 2018 on deductions.
28. Regrettably, neither of these letters was responded to or acknowledged nor precipitate any action by the respondent and it was not until that the instant application was filed on 18th January, 2024, that the respondent filed its Notice of Preliminary Objection dated 5th September, 2024 contesting the applicants standing to institute the instant suit, which the court dismissed for want of merit vide ruling delivered on 29th January, 2025.
29. Attached to its Replying Affidavit was an invoice under the name Sytamex Ventures Ltd dated 27th January, 2025 to the respondent for payment of the sum of Kshs.138,280.00 as salaries for workers for January, 2025, NSSF and SHA deductions, housing levy and management fees for 7 unnamed employees and a receipt of even date was attached.
30. If the respondent's averments and documents are to be believed, it had outsourced its human resource function and pays Sytamex Ventures Ltd a management fee as the employer. However, an outsourcing arrangement is typically a written contract between the parties and none has been availed.
31. Puzzlingly, the applicant did not contest this deposition by Mr. Varsani vide a Supplementary Affidavit or seek evidence on the relationship between the respondent and Sytamex Ventures Ltd.
32. Intriguingly, the applicant's submissions dated 9th April, 2025 are largely addressing the main suit as shown by the issues in dispute that are highlighted.
34. Relatedly and significantly, other than deposing that the applicant had recruited 16 out of 17 unionisable employees of the respondent to its ranks and had forwarded check off forms to the



- respondent, there is no averment as to what has been happening to the members and which precipitated the instant application under a certificate of urgency on 18th July, 2024.
35. Other than certification and dispensation with service upon the respondent, the primary relief is number 3 of the Notice of Motion which is grounded on the allegation that the respondent has been or is likely to victimize, intimidate, coerce, harass, terminate or dismiss its employees on account of having joined the applicant union.
 36. Other than the respondent's refusal to respond to the applicant's letter and engage in the finalization of the Recognition Agreement, the Applicant's Supporting Affidavit is reticent on acts or omissions of the respondent from which the alleged imminent victimization threats or coercion on the basis of union membership may be inferred.
 37. In the court's view, the instant application turns on whether the applicant has placed sufficient material before the court to enable it grant the reliefs sought.
 38. Put it alternative terms, the matter turns on the burden of proof of the applicant's case.
 39. Section 107 of the *Evidence Act* provides:

SUBPARA (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.

SUBPARA (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.
 40. Section 8 of the Act provides:

The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.
 41. Similarly, in *Jethwa V Shah t/a Supreme Styles [1989] eKLR*, the Court of Appeal stated as follows:

"With respect, it is not sufficient for the applicant merely to swear. He ought to have furnished facts and figures of many dealings. The burden was all the time on the applicant to prove... 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. (See *Raila Amolo Odinga & another V IEBC & 2 Others [2017] eKLR*, *Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others [2014] eKLR*, *Mbuthia Macharia V Anna Mutua Ndwiga & another [2017] eKLR*, *Muriungi Kanoru Jeremiah V Stephen Ungu M'warabua [2015] eKLR*, the Halsbury's Laws of England 4th Edition, Volume 17 at para 13 and 14, *Statpack Industries Ltd V James Mbiti Munyao HCCA No. 152 of 2003*, *Treadsetters Tyres Ltd V John Wekesa Wephukalu [2010] eKLR*, *Alfred Kioko Muteti V timothy Miheso & another [2015] eKLR*, *Sally Kibii & another V Francis Ogaro [2012] eKLR*, *Suleiman Kasuit Murunga V IEBC & 2 others [2018] eKLR*, *Alice Wanjiru Ruhui V Messiac Assembly of Yahwe [2021] eKLR* and *Mary Wambui Kabuguo V Kenya Bus Servies Ltd [1997] eKLR*).
 43. It is trite law that in civil cases the standard of proof is on a balance of probabilities.



44. In *William Kabogo Gitau V George Thuo and 2 others* [2010] eKLR Kimaru J (as he then was) expressed himself as follows:

In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred”.

45. See also Lord Nichols in *re HC (minors)* [1996] A.C 563 at 586, *Miller V Minister of Pension* [1947] ALLE R 373, *Spring Board Capital Ltd V Njenga & another* [2024] KEHC 7013 (KLR).

46. The applicant is seeking an Order to restrain the respondent from victimising, intimidating, coercing, harassing, terminating, dismissing or disciplining its members but has failed to provide sufficient evidence to demonstrate that the respondent or its agents or representatives are, have been or are likely to engage in the activities sought to be restrained.

47. The Supporting Affidavit sworn by Benjamin Tangara is loudly silent on the issue.

48. Equally, none of the applicant’s members working with the respondent has sworn an affidavit which alleges victimization, harassment, coercion or intimidation by the respondent or availed evidence from which the court could infer such conduct on the part of the respondent.

49. Flowing from the foregoing, it is decipherable that the applicant’s Notice of Motion dated 17th July, 2024 is for dismissal and it is accordingly dismissed with no Order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

