



**Kenya Union of Road Contractors & Civil Engineering Workers v China Railway
No. 5 Engineering Group Limited (Employment and Labour Relations Cause
E233 of 2022) [2024] KEELRC 263 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E233 OF 2022
JK GAKERI, J
FEBRUARY 15, 2024**

BETWEEN

**KENYA UNION OF ROAD CONTRACTORS & CIVIL ENGINEERING
WORKERS CLAIMANT**

AND

CHINA RAILWAY NO. 5 ENGINEERING GROUP LIMITED RESPONDENT

JUDGMENT

1. The Claimant union commenced this suit by a Memorandum of Claim dated 11th April, 2022 alleging that the Respondent had failed to remit trade union dues and refused to pay housing allowance to one Samuel O. Ademba, ID No. 28588467 and 394 others.

The Claimant's case is pleaded as follows;

2. That the employees in question are members of the Claimant union as per Legal Notice No. 159 by which the Ministry of Labour, forwarded check off forms signed by 300 employees but the Respondent refused to deduct trade union dues and the dispute was reported to the Cabinet Secretary, Ministry of Labour and Social Protection who appointed a Conciliator on 23rd November, 2021 and at the conciliation meeting, the Respondent agreed to deduct and remit union dues and confirmed selective deduction vide letter dated 10th February, 2022 and none of the employees had resigned from the union as by law required.
3. As regards housing allowance, the Claimant union alleges that the appointment letters of the members provide for payment of house allowance at 15% and cites the letter to one Mr. Conelius Kipchirchir employed as a driver on 14th June, 2019.



4. The Claimant alleges that it issued a strike notice in accordance with the *Labour Relations Act*, 2007 and the Cabinet Secretary appointed a Conciliator via letter dated 18th January, 2022 and the parties agreed on five issues on 25th July, 2022 including cancellation of the strike notice and compliance with the Building and Construction Wages Order, 2012.
5. That the Respondent has frustrated the Claimant's members and requested its employees to sign new letters of appointment effective 1st February, 2022 and they protested.
6. The Claimant prays for;
 - i. An Order directing the Respondent to deduct and remit monthly union dues of its members in the shared check off forms.
 - ii. An Order directing the Respondent to pay all unremitted union dues from September 2021 to date.
 - iii. An Order directing the Respondent to comply with the *Labour Institutions Act* (Building and Construction) Wages Order 2012.
 - iv. An Order directing the Respondent to pay the Claimant's members their statutory minimum house allowance of 20% of the employee's rate of pay.
 - v. Costs of this suit.

Respondent's case

7. In its amended Statement of Response dated 17th October, 2022, the Respondent avers that the absence of a Recognition Agreement or CBA notwithstanding, it has been remitting dues to the Claimant union with respect to employees who are verified union members as recommended by the Conciliator's letters dated 28th March, 2022, a total of 197 members and no further verification exercise had taken place and the alleged selective remittance was not factual and the Claimant has not sought a certificate from the Conciliator that the dispute remains unresolved.
8. That in the absence of a CBA, the issue of house allowance can only be determined based on individual contracts of employment.
9. That the alleged strike was not an issue before the court and reference to the Respondent as arrogant, defiant or disobedience was the Claimant's opinion
10. It is the Respondent's case that it pays its workers more than the minimum wage under the Regulation of Wages Order and Mr. Samuel Ademba, a Foreman, has a basic salary of Kshs.48,400/= per month compared to the minimum wage of Kshs.12,774/= per month.
11. It is the Respondent's case that the Claimant's suit is premature and frivolous and designed to precipitate a conflict with the union and prays for its dismissal with costs.

Claimant's submissions

12. The National Secretary General of the Claimant union submitted on entitlement of the union to union dues, joining of a trade union and minimum terms and conditions of employment.
13. On the 1st issue, it was submitted that the Claimant was constitutionally entitled to recruit and represent employees of the Respondent and shared checkoff forms and had 255 members in its forms.



14. Reliance was made on the provisions of Section 4 of the *Labour Relations Act*, 2007 on the rights of unionisable employees, Article 41 of *the Constitution* of Kenya, 2010 as well as the decisions in BIFU V Bora Sacco Society (2016) eKLR, Tailors & Textiles Workers Union V Global Apparels EPZ Ltd & others (2019) eKLR as well as Tiles Wood Fly & Interior Design Employees Union (KCSWI) V Kenya Building, Construction, Timber and Allied Industries Employees Union (2016) eKLR to urge that union dues are payable from the employer's account not employees and employees had the right to join a union of their choice.
15. On minimum terms and conditions, it was submitted that housing allowance under the relevant Regulation of Wages Order was 20% of the employees rate of wages, that the Respondent was paying 15% and the Claimant was demanding the sum of Kshs.547,662,400/=, not pleaded in the claim.
16. Strangely, the Claimant union is claiming unremitted dues of 1644 employees of the Respondent.
17. It was submitted that mediation failed despite all efforts made.

Respondent's submissions

18. The Respondent's counsel submitted on the Claimant's claim for union dues and house allowance for 395 alleged members of the union.
19. On the 1st issue, counsel cited Section 48(2) and (3) of the *Labour Relations Act*, 2007 on deductions and remittance of union dues, submitting that the Ministerial Order mentioned was not availed or filed in court.
20. That the Respondent's deductions and remittances of union dues was compliant with the law.
21. According to counsel, the issue was considered by the Conciliator in his report dated 28th March, 2022 and concluded that only 197 employees had confirmed union membership and the Respondent had been remitting their dues.
22. Reliance was made on the decision in Kenya National Union of Nurses V Nyabondo Mission Hospital (2023) eKLR on the conditions a union must satisfy for an employer to deduct and remit union dues from its employees, namely Ministerial Order and notice in Form S from the union as required by the 3rd Schedule to the *Labour Relations Act*, 2007 and the Claimant had not availed a copy of the Order as it bore the burden of proof under Section 107 and 108 of the *Evidence Act* and thus its claim for union dues was unsustainable.
23. Counsel submitted that the Respondent had created a conducive labour environment by deducting and remitting union dues for employees who had verified union membership and only 197 had been verified and evidence of remittances had been provided for the months of February 2022, March 2022, April 2022, May 2022, July 2022 and August 2022.
24. On house allowance, counsel submitted that the issue was raised before the Conciliator and settled vide the tripartite agreement of 25th January, 2022 executed by all parties including the Conciliator.
25. That the Claimant lacks locus standi to make such a prayer to the court because the suit was filed as a trade dispute and had only produced the report of the Conciliator dated 28th March, 2022 and ignored the one dated 25th January, 2022 on house allowance.
26. Counsel urged that the union neither filed minutes of the conciliation proceedings nor the Conciliator's report and cites the sentiments of Bakery Confectionary Food Manufacturing and Allied Workers Union (K) V United Millers Ltd (2019) eKLR to urge that the Claimant had failed to produce



a conciliation report or the requisite affidavit and thus had no audience on the alleged failure by the Respondent to pay house allowance.

27. Counsel submitted that the Respondent paid its employees a consolidated wage as evidenced by the sample contract on record and Mr. Ademba's wage in January 2022 was Kshs.41,166.67.
28. That the Claimant's averment that the Respondent has failed to pay house allowance is unsustainable unless supported by evidence.
29. Finally, counsel submitted that since the parties had no recognition agreement, the Claimant had no legal authority to agitate on behalf of its members in a court of law as employment matters are captured in the CBA which is a consensual document and relies on the sentiments of Mbaru J. in *Communication Workers Union V Safaricom Ltd (2014) eKLR* to reinforce the submission.

Determination

30. The issues for determination are:
 - i. Whether the Claimant's suit is premature.
 - ii. Whether the claim for house allowance is sustainable.
31. Before delving into the foregoing issues, it is essential to dispose of the critical question raised by the Respondent's counsel, whether the Claimant union has locus standi to agitate on behalf of its members in a court of law.
32. Counsel for the Respondent urged that the Claimant union had no locus standi as it had neither a recognition agreement with the Respondent nor a CBA and cited the sentiments of Mbaru J. in *Communication Workers Union V Safaricom Ltd (Supra)*.
33. However, the more persuasive sentiments are those of Rika J. in *Kenya Shoe & Leather Workers Union V Falcon Tanners Ltd* where the learned judge stated;

“There is no legal obscurity on the right of representation of the employees by the trade union. The law, including the Industrial Court Act and the *Labour Relations Act*, as correctly argued by Mr. Maina extends the right of representation of the employee in to the trade union acting through its authorised officers”.
34. The foregoing sentiments are consistent with the provisions of Section 22 of the *Employment and Labour Relations Court Act*, 2011 which provides that;

“In any proceedings before the court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers organization and, if the party is a juristic person by a director or an employee, specifically authorised for that purpose.”
35. The right of a trade union to sue on behalf of its member(s) even in the absence of a Recognition Agreement was settled by the Court of Appeal in *Modern Soap Factory V Kenya Shoe and Leathers Workers Union (2020) eKLR*, in the following words;

“Article 41 of *the Constitution* of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others to join a trade union, which in turn has the right to determine its activities. Article 258 of *the Constitution* on enforcement of *the Constitution* provides in Article 258 (2)(d) that an association acting in the interest of one



or more of its members may institute proceedings where the constitution is contravened or threatened with contravention . . .

We can see no reason therefore to fault the conclusion by the judge that the Respondent has locus standi to institute the claims on behalf of its members . . .”

36. The Court of Appeal was emphatic that a recognition agreement is typically concluded between an employer and a trade union for purposes of collective bargaining as ordained by Section 54(1) of the Labour Relations Act, 2007.

“It is not the basis upon which the trade union represents its members in court” the court stated.

37. To the question whether the Claimant union has legal authority to institute proceedings on behalf of its members, the answer is in the affirmative.

38. As to whether the Claimant union’s suit is premature, the Respondent’s counsel submitted that the Claimant’s union had not demonstrated its entitlement to union dues as by law required.

39. On the part of the Claimant, other than alleging that it forwarded check-off forms of 300 employees, it has not pleaded how much it is claiming or how much has not been paid and in respect of how many employees.

40. Strangely, the number of grievants in respect of which union dues are claimed varies from time to time as follows;

41. In its Memorandum of Claim, the Claimant avers that the check-off forms were signed by 300 employees.

42. Similarly, the letter cited as evidence of the 300 employees (CO2) refers to 203 employees.

43. Finally, in its submissions, the Claimant cites a figure of 1644 employees.

44. Implicitly, the Claimant is unsure of the Respondent’s employees who are its members in respect of whom union dues are payable.

45. This perhaps accounts for the absence of the amount claimed as union dues which are special damages which must be specifically pleaded and proved by evidence.

46. Puzzlingly, the Conciliator’s report has a figure of 197, a figure the Respondent acknowledges.

47. Intriguingly, the Claimant has not denied that the Respondent has been making payment to it as evidenced by remittance slips on record which the Claimant union has not contested and the letter dated 10th February, 2022.

48. In his report dated 28th March, 2022, the Conciliator states that only 197 employees gave consent for deduction of union dues as at the time of conciliating meeting and the verification exercise had not been finalized.

49. Significantly, none of the parties provided evidence to show that it responded to the Conciliator’s appeal within 7 days as a sign of commitment to the settlement of the dispute.

50. As correctly submitted by the Respondent, the Claimant union provided neither evidence of its position before the Conciliator nor the Conciliator’s certificate or other evidence to show that the dispute was unresolved as provided by Section 69 of the Labour Relations Act, 2007.



51. Having failed to demonstrate that the dispute between the Claimant union and the Respondent was unresolved by conciliation, the Claimant union has failed to demonstrate the grounds on which it filed the instant suit under Certificate of Urgency.
52. Clearly, the Claimant union abandoned conciliation and filed the instant suit less than 2 weeks after the Conciliator's last proposal dated 28th March, 2022 and before the Conciliator had given his certificate of unresolved dispute.
53. Rule 5(1)(b) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires that the statement of claim shall be accompanied by a report by the Conciliator's on the conciliation process with minutes of the conciliation, meeting and a certificate of conciliation issued by the Conciliator under Section 69 (a) of the [Labour Relations Act, 2007](#).
54. Similarly, under Rule 5(2) of the Rules, 2016 provides that;

“Where the labour dispute has been a subject of conciliation and the conciliator has not issued a certificate, the statement of claim shall be accompanied by an affidavit sworn by the Claimant or by the representative of the Claimant attesting to the reasons why the conciliator has not issued a certificate of reconciliation.”
55. Notwithstanding, the fact that these rules are couched in mandatory terms, the Claimant union did not comply with them which arguably renders the suit improperly filed.
56. Finally, as regards the Claimant's entitlement to union dues, the Respondent's counsel argued that it was not as it had not complied with the provisions of the [Labour Relations Act, 2007](#).
57. In its Memorandum of Claim, the Claimant makes reference to “Legal Notice 159 issued by the Cabinet Secretary, Ministry of Labour and Social Protection”.
58. The Claimant makes no reference to the date of the Legal Notice and has not availed a copy for perusal by the court.
59. Section 48 of the [Labour Relations Act, 2007](#) provides that;
 1. . . .
 2. A trade union may, in the prescribed form, request the Minister to issue an Order directing an employer of more than 5 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 sub-section (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.



60. Relatedly, Section 19(1)(g) of the *Employment Act*, 2007 requires an employer to deduct an amount in which it has no direct or indirect beneficial interest and which the employee has requested the employer in writing to deduct from his wages.
61. In the absence of the Ministers Orders made reference to by the Claimant, it is unclear to the court whether the provisions of Section 48 of the *Labour Relations Act*, 2007 were complied with.
62. From copies of the documents on record, it is clear that the Claimant and the Respondent have had several interactions by way of conciliation through the Labour Officer.
63. Records also reveal that the issue of house allowance was raised and addressed on 25th January, 2022 when the parties signed the conciliation report of even date.
64. The Respondent's management undertook to comply with the Labour Institution (Building and Construction) Wages Order, 2012 among other resolutions and the Labour Office was obligated to conduct regular checks to monitor implementation of the resolutions.
65. All the parties signed the report and by letter dated 12th February, 2022, the Respondent wrote to the Claimant expressing its resolve to comply with and implement the contents of the agreement.
66. There is no evidence on record to show that the Respondent did not honour its part of the bargain on house allowance.
67. Noteworthy, the Conciliator's report dated 28th March, 2022, which was the last communication from the Conciliator before the instant suit was filed, excludes house allowance as an issue in dispute.
68. Strangely, the Claimant provided no evidence of the salaries paid to its members or the house allowance paid to enable the court appreciate its case.
69. Flowing from the foregoing, the court is in agreement with the Respondent's counsel's argument that the issue of housing allowance was concluded on 25th January, 2022.
70. Finally, as mentioned elsewhere in this judgement, documents on record reveal that the Claimant initiated the instant suit a few days after the Conciliator, Mr. Albert Ngeresa Sakwa had forwarded his report and recommendations to the Claimant and the Respondent and requested them to respond within 7 days but none of the parties did by way of acceptance or rejection or state its position.
71. But more significantly, the Claimant did not attach a copy of the conciliation certificate to prove that the conciliation process had failed.
72. In an endeavour to have the dispute resolved, the Conciliator recommended that verification of employees who were willing to join the Claimant union be finalized as only 197 employees had been verified and consented to the deductions.
73. The conciliation report dated 28th March, 2022 makes it abundantly clear that the conciliation process on deduction of union dues was on-going by the time the instant suit was filed and no urgency was demonstrated by the Claimant union as by law required.
74. In the upshot, it is the finding of the court that the instant suit was filed prematurely and is thus unsustainable at this stage and is accordingly dismissed.
75. The parties are however at liberty to engage the Labour Officer for purposes of concluding the verification exercise.
76. Parties shall bear their own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

