



**Kenya Concrete, Structural, Ceramic Tiles, Wood Plys and Interior Design  
Workers Union v Cibien Engineering Construction Company Limited (Cause  
E805 of 2023) [2024] KEELRC 215 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 215 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E805 OF 2023  
SC RUTTO, J  
FEBRUARY 9, 2024**

**BETWEEN**

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

**AND**

**CIBIEN ENGINEERING CONSTRUCTION COMPANY  
LIMITED ..... RESPONDENT**

**RULING**

1. By way of a Notice of Motion Application dated October 4, 2023, the Claimant/Applicant moved this Court seeking the following orders:
  - a. Spent
  - b. That an order be and is hereby issued directing the Respondent by itself, agents and any of its assigns to immediately commence deductions and remittance of union dues into the Claimant’s gazette bank account contained in the Legal Notice no. 5 of 2022 dated 21<sup>st</sup> January 2022 as prescribed in the Forms “S” duly served upon it on January 6, 2023 pending the hearing and determination of this Application.
  - c. That an order be and is hereby issued restraining the Respondent from any act of victimization including termination of existing appointments and dismissing any member of the Claimant/ Applicant on account of this suit pending hearing and determination of this application and the main suit.
  - d. That this application and the main suit be merged and proceed by way of documentation as provided for under rule 21 of the *Employment and Labour Relations Court Procedure Rules, 2016*.



- e. That this Honorable Court be pleased to grant such orders or relief as it deems fit and just in the circumstances.
  - f. Cost of this suit be borne by the Respondent.
2. The Application is supported by the Affidavit sworn on 4<sup>th</sup> October 2023 by Mr. Dishon Angoya who describes himself as the General Secretary of the Claimant/Applicant. Mr. Angoya avers that the Claimant/Applicant has recruited into its membership 30 employees of the Respondent who had acknowledged their membership of the Claimant/Applicant by way of Check-off forms dated 30<sup>th</sup> November 2022. He further avers that the unfortunate delay by the Respondent in deducting and remitting the trade union dues in favour of the Claimant prompted the union to report a trade dispute to the Ministry of Labour via a letter dated 30<sup>th</sup> January 2023. The Ministry of Labour appointed Ms. Caroline Chemursoi to conciliate the dispute.
  3. He further deposes that both parties met before the conciliator on 27<sup>th</sup> June 2023 and recorded an agreement contained in the certificate of resolved dispute dated June 27, 2023 with the Respondent agreeing to commence deductions and remittance of union dues in favour of the Claimant.
  4. Mr. Angoya further avers that the Respondent has blatantly neglected, ignored and/or refused to comply with the orders in the Legal Notice no. 5 of 2022 dated January 21, 2022 contrary to the mandatory provisions of section 48(3) of the Labour Relations Act without any justifiable and reasonable cause.
  5. According to Mr. Angoya, the conduct of the Respondent has denied the claimant/applicant revenue from July 2023 being trade union dues from its members.
  6. Mr. Angoya further avers that the Respondent's refusal to deduct and remit union dues from the salaries of 30 employees who have acknowledged their membership to the Claimant/Applicant is an anti-trade union activity which contravenes article 27(2) of the Constitution of Kenya and article 41(2) (c) of the Constitution of Kenya section 4(1) of the Labour Relations Act 2007 and International Labour Convention No. 87 of 1948.
  7. He further deposes that the Respondent has unconstitutionally and unlawfully continued to frustrate the efforts of the Claimant/Applicant in realizing a recognition agreement with the Respondent in order to pave way for the negotiations, formulation and finalization of a Collective Agreement.
  8. The Respondent opposed the Application through a Replying Affidavit sworn on 18<sup>th</sup> October 2023 by Mr. Mohamed Anzar Zain who avers that the Respondent's relationship with its employees is essentially contractual and in compliance with the Employment Act.
  9. That the Respondent is yet to receive any written request from any of its employees to deduct any amount from the wages and remit to the Claimant. Mr. Anzar contends that the Respondent cannot do that unilaterally or on the instructions of the Claimant. That as advised by his Counsel, which advice he verily believes to be true, that would be a breach of the contract between the Respondent and its individual employees and a violation of section 19(g) of the Employment Act.
  10. With regards to recognition, Mr. Anzar avers that the Claimant has failed to even provide a list of its membership on the Respondent's employment. That further, no single employee of the Respondent has informed it that he/she is a member of trade union, let alone the Claimant.
  11. He has also been advised by his Counsel which advice he verily believes to be true that the Legal Notice no. 5 of 2022 of January 21, 2022 displayed on the supporting affidavit is generic and in



non-compliance with section 48 of *Labour Relations Act*. That the Respondent is yet to receive an appropriate Legal Notice addressed to it by the Minister on the matter.

12. Mr. Anzar further states that the Respondent does not have a single person on its employment having membership of the Claimant and it (Claimant) has failed to provide evidence of membership.
13. On the issue of victimization, he avers that no evidence of victimization or apprehended victimization of any employee of the Respondent has been provided hence this prayer is premised on speculation.

### **Submissions**

14. The Application was canvassed by way of written submissions. In support of its Application, the Claimant has submitted that issues of membership and remittance of union dues can be determined at this interim stage as it is obvious that the Respondent has no valid controverting response.
15. The Claimant further submits that the mere fact that the pleadings in this cause pit the Respondent against its members and moreso, the disclosed list of 30 members identifiable by name demands that the vulnerable mentioned members be protected while the suit is pending. In the same vein, the Claimant posits that there is reasonable apprehension that they may face victimization.
16. With regards to the suit proceeding by way of documentary evidence, the Claimant submits that the same will expedite proceedings and save the Court's time. In conclusion, the Claimant has urged the Court to grant the prayers sought.
17. On its part, the Respondent has submitted that orders sought in the Application are not provisional measures but final orders. The Respondent contends that such substantive orders are more appropriately addressed in the main Claim. In support of this argument, the Respondent sought to rely on the case of *Kenya Concrete, Structural, Ceramic Riles, wood Pls and Interior Design Workers Union v Wanxin Investments* (2021) eKLR.
18. The Respondent has further submitted that its relationship with its employees is contractual and in compliance with the *Employment Act*. Placing reliance on section 19(g) of the *Employment Act*, the Respondent further submits that to date, it has not received written instructions from its employees to deduct union dues for remittance to the Claimant.
19. With regards to victimization, the Respondent maintains that no evidence has been presented to support the claim of victimization of breach of employee rights under article 41 of the *Constitution*. To this end, the Respondent has urged the Court to dismiss the Application.

### **Analysis and Determination**

20. From the face of the Application, it is evident that the Court at this juncture is being called to determine the following issues:
  - i. Deduction and remittance of union dues from the Respondent's employees to the Claimant Union;
  - ii. Whether the Court should issue orders restraining the Respondent from victimizing its employees on account of their union membership; and
  - iii. Whether the matter should proceed by way of documentary evidence.



## Deduction and remittance of union dues

21. It is the Claimant's case that it has recruited into its membership 30 employees of the Respondent who acknowledged their membership by way of check-off forms. In this regard, the Claimant contends that the Respondent has without any lawful cause, refused to deduct and remit union dues from its members. In support of its case, the Claimant exhibited a copy of a letter dated 6<sup>th</sup> January 2023 addressed to the Respondent's Managing Director, requesting for deduction and remittance of union dues from the employees it had recruited into its membership.
22. The Claimant further exhibited a copy of Form S constituting the notice and authority to deduct union dues from the employees who have acknowledged membership to the Union.
23. Notably, the Respondent's main contention is that it is yet to receive any written request from any of its employees to deduct any amount from their wages and remit the same to the Claimant. The Respondent's argument is based on section 19(g) of the *Employment Act*.
24. The *Constitution* and the *Labour Relations Act* acknowledge and guarantee freedom of association, which includes the right of an employee to belong, or not belong to a trade union. This is also the position under *ILO Convention* No. 87 although I note that Kenya is yet to ratify the same.
25. In this regard, the right to form, join or participate in the activities and programmes of a trade union is guaranteed under Article 41(2) (c) of the *Constitution*. Further, Article 36 (1) of the *Constitution* guarantees freedom of association in the following manner:
  - (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
26. section 4 (1) of the *Labour Relations Act* is one of the ways through which the above Constitutional provisions have been given effect.
27. Flowing from the above constitutional and statutory provisions, it is clear that the right of the Respondent's employees to join the Claimant's membership is guaranteed and is inalienable.
28. From the record, there is no evidence exhibited contradicting the willingness of the Respondent's employees to join the Claimant Union.
29. That said, payment of union dues by members, is an obligation that goes hand in hand with the right to join a trade union. Specifically, section 48(2) and (3) of the *Labour Relations Act* provides that: -
  - (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.



30. To this end, once an employee is recruited to a union and acknowledges membership thereto, an employer is required to commence deductions and remittance of trade union dues for the recruited employee within 30 days of being served with a notice in Form S.
31. Therefore, the employee's acknowledgement through Form S constitutes sufficient instructions within the meaning of Section 19(g) of the *Employment Act*. The Respondent's argument is that it is yet to receive any written instructions from its employees authorizing deductions does not therefore hold. Besides, a clear reading of Section 48(3) of the *Labour Relations Act* reveals that it is the trade union as opposed to the employee, that serves the duly signed Form S upon the employer.
32. Further, it is noteworthy that Section 48(3), is couched in mandatory terms hence it is not up to the employer to elect whether or not to comply.
33. Accordingly, the Respondent in this case having been served with Form S duly signed by its employees, is mandated to effect deductions of union dues from said employees and remit the same to the Claimant's gazetted bank account.

Victimization of the Claimant/Applicant's members on account of their union membership

34. The Claimant has further sought an order to restrain the Respondent from any act of victimization including termination of existing appointments and dismissing any of its members on account of the instant suit.
35. It is notable from the record that there is no evidence from the Claimant's end that any of its members has been victimized or threatened on account of their union membership hence an order to that effect cannot issue.
36. This notwithstanding, I wish to point out that victimization of an employee on account of their union membership is a direct violation that goes to the heart of article 41 of the *Constitution* and the constitutional right to associate under article 36 of the *Constitution*. As I have stated herein, this is an inalienable right that cannot be taken away. The bottom line is that an employee who wishes to join a union should not be subjected to any form of victimization or threat.

#### **Determination by way of documentary evidence**

37. The Claimant has further sought an order that this suit proceed by way of documentary evidence. rule 21 of the *Employment and Labour Relations (Procedure) Rules, 2016* provides as follows:

The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties. Underlined for emphasis
38. In this case the Respondent has objected to the Claimant's prayer to have the suit proceed by way of documentary evidence. As is clear from Rule 21 reproduced above, the Court can only make such an order with the consent of all parties. This being the case, the order to have the matter proceed by way of documentary evidence cannot be granted.
39. Besides, it is apparent from the Statement of Claim that the Claimant has sought an order of Recognition as one of its main prayers. It follows that such an order can only be issued following a full trial and upon evaluation of evidence from both sides to confirm whether the Claimant has met the requisite threshold for purposes of recognition.



**Order**

40. In the final analysis, the Court allows the Application dated 4<sup>th</sup> October 2023 in the following terms:
- a. The Respondent do forthwith commence deductions and remittance to the Claimant/Applicant’s gazetted bank account, dues from the employees who have duly signed Form S and acknowledged union membership to the Claimant/Applicant union.
  - b. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant/Applicant Mr. Angoya

For the Respondent Mr. Olunya

Court assistant Abdimalik Hussein

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

