



**Kenya Engineering Workers Union v Farm Engineering Industries Limited  
(Cause E060 of 2021) [2024] KEELRC 152 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 152 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E060 OF 2021  
CN BAARI, J  
FEBRUARY 8, 2024**

**BETWEEN  
KENYA ENGINEERING WORKERS UNION ..... CLAIMANT  
AND  
FARM ENGINEERING INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In a Memorandum of Claim dated 17<sup>th</sup> August, 2021, the Claimant seeks the award of the following remedies: -
  - i. That the Honourable Court be pleased to find that the Respondent's action of outsourcing of core business to be unlawful and unprocedural by declaring it null and void.
  - ii. That the Honourable Court does issue an order against the Respondent and/ or her agents from outsourcing labour for the core business.
  - iii. That the Honourable Court be pleased to adopt the Conciliator's recommendations.
  - iv. That the Honourable Court do issue an order against the Respondent to pay all unionisable employees may it be casuals, contractees, permanent and outsourced in line with parties CBA.
  - v. That the Respondent to meet the costs of this suit.
  - vi. That any other Relief the Honourable Court may deem fit to grant.
2. The Respondent opposed the claim vide a Statement of Defence dated 6<sup>th</sup> March, 2023 and filed on 17<sup>th</sup> April, 2023.



3. The Claimant's case was heard on 25<sup>th</sup> July, 2023. The Claimant presented a Mr. Tom Owuor, to testify in support of its case.
4. The Respondent's case was heard on 26<sup>th</sup> September, 2023. A Mr. James Mathew Odhiambo testified in support of the Respondent's case. He adopted his witness statement and produced documents filed as exhibits in support of their case.
5. Both parties filed submissions.

### **The Claimant's Case**

6. The Claimant's case is that the parties herein, have a duly signed and valid Recognition Agreement and have negotiated various Collective Bargaining Agreements (CBAs). The Claimant further states that the most recent CBA between it and the Respondent, was signed on 28<sup>th</sup> September, 2015, and registered on 7<sup>th</sup> September, 2016, under reference number CA No.215 of 2016.
7. It is the Claimant's case that during negotiations to review the current CBA, parties did not agree, prompting the Claimant to report the matter to the Ministry of Labour, and later to the Court in ELRC Cause No. 32 of 2019, in which judgment was entered in favour of the Claimant.
8. The Claimant states that when the said suit was underway, the Respondent started to terminate the services of the Claimant members through redundancies, dismissals, and normal termination, and replacing them with outsourced employees from an agent whom they underpay.
9. The Claimant further states that the outsourced services are not part of the parties' CBA, hence illegal.
10. The Claimant states that it had over 30 members in the service of the Respondent, but now it, only has 18, the rest have been rendered redundant by the Respondent and replaced with outsourced employees. The Claimant states that it was not consulted when the Respondent resolved to outsource.
11. It is the Claimant's case that the outsourced workers are paid on a daily basis and below the rates agreed upon under the CBA.

### **The Respondent's Case**

12. The Respondent states that it has at all material times raised no issue with any employee joining a labour union, including subscribing to the membership of the Claimant.
13. The Respondent further states that it has at all times duly deducted and remitted union dues for every employee who is a member of the Claimant and treated all its employees impartially.
14. It is the Respondent's case that no evidence has been furnished demonstrating that it outsourced its core business, and the alleged outsourced employees for such core business.
15. The Respondent further states that the CBA between the parties does not have any provision prohibiting it from outsourcing services. It is the Respondent's case that while it outsourced some services from an external company, no employee was barred from joining the union if they desired to join.
16. The Respondent states that the recommendation by the Conciliator has been overtaken by events, and further that the Court in its decision in ELRC Number 32 of 2019, did not give any directions on the issue of outsourcing business.



17. It is the Respondent's case that employees that were terminated was as result of disciplinary issues, and such terminations have been dealt with on an individual employee basis and without any bias to employees who are members of the Claimant union.
18. The Respondent states that even when there was need to restructure its operations to keep the company as a going concern owing to a massive decline in business, and some functions having been rendered obsolete, only 6 unionized employees were declared redundant, and not the entire unionized team of employees as the Claimant alleges.
19. It is its further case that the redundancy process was overseen by the Conciliator who considered and approved the reasons for declaring the 6 employees redundant, and advised the shortening of the period from 18 months to 12 months and which advise the Respondent adhered with.
20. The Respondent states that the Conciliator's recommendations whilst not binding on this court, are now incapable of being adopted as the said recommendations have since been overtaken by events.
21. The Respondent prays that the Court dismisses the Claimant's case with costs.

### **Analysis and Determination**

22. I have carefully considered the pleadings herein, the witnesses' oral testimonies, and the parties' submissions. The issues that arise for determination are:
  - i. Whether outsourcing of employees by the Respondent violates the CBA it has with the Claimant.
  - ii. Whether the Claimant deserves the reliefs sought.

### **Whether outsourcing of employees by the Respondent violates the CBA it has with the Claimant.**

23. The Claimant's case is that it has a signed and registered Collective a Bargaining Agreement (CBA) with the Respondent, and the Respondent has gone on to render the Claimant's members redundant and replaced them with outsourced employees. It is the Claimant's further assertion that out of its initial 30 members in the service of the Respondent, the redundancies have since reduced its membership to only 18 members.
24. The Claimant's issue is that it was not consulted when the redundancies were declared, and that this turn of events, is intended to frustrate the CBA between the parties herein.
25. The Respondent on its part told court that the redundancies were effected within the law and with the concurrence of the Labour Officer. It is their further position that other terminations that affected the membership of the Claimant, were solely premised on individual employee misconduct.
26. The Claimant's claim is not premised on declaration of redundancy or the termination of any specific member in the service of the Respondent. Its issue concerns more the outsourcing of employees by the Respondent, which has overtime drastically reduced its membership numbers.
27. In the case of *Wrigley Company (East Africa) Limited versus Attorney General & 2 others & another* [2013] eKLR, the Court had this to say on outsourcing: -

“... it is necessary to set the parameters for a credible outsourcing program as follows inter alia:

- a) Ordinarily, employers are not expected to outsource their core functions;



- b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;
- c) 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 in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and
- d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.”

28. Further, in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the Court addressed the issue of outsourcing as follows: -

“..... in this age of heightened technology, increased mechanization, and an increasingly skilled workforce, there are diverse business concepts which when effected, can cost-effectively facilitate expansion and growth of a business, while reducing workforce requirements. Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs.”

- 28. The Respondent has admitted outsourcing some of its workers, but nothing shows that the employees outsourced are those handling its core mandate.
- 29. Further, the Claimant has not led any evidence on the number of employees the Respondent has outsourced, what each of the employees does and how much they are paid, so as to prove that the intention for the outsourcing is to discriminate between employees that are outsourced from those that are directly employed by the Respondent.
- 30. The Claimant’s witness (CW1) told court that the issue of redundancies is still pending determination before the Ministry of Labour. CW1 further told court that the Respondent remits union dues for its members and further that the Claimant is in the process of recruiting the outsourced workers to the Claimant’s union.
- 31. As the law stands, the triangular employment in the nature of a generalized outsourcing agency is unregulated. This situation carries with it the potential to deny workers the right to collective bargaining with their de factor employer.
- 32. It is however also true, that nothing bars a union from recruiting members from outsourced employees provided they fall within their area of representation.
- 33. In light of the foregoing, I find and hold that the outsourcing of employees by the Respondent has not violated the CBA between the parties herein.

**Whether the Claimant deserves the reliefs sought.**

- 34. The reliefs sought herein, are only tenable upon a finding that the Respondent’s outsourcing of employees violated the existing CBA between the parties. The contrary being the case, the prayers sought fail and are dismissed.
- 35. Parties shall bear their own costs of the suit in the interest of promoting social partnership.



36. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 8<sup>TH</sup>  
DAY OF FEBRUARY, 2024.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Makale present for the Claimant

Ms. Bundi h/b for Mr. Githonga for Respondent

Erwin Ongor- C/A

