



Banking Insurance and Finance Union (K) v Thamani Savings and Credit Society Limited (Cause E324 of 2023) [2024] KEELRC 773 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E324 OF 2023
SC RUTTO, J
MARCH 20, 2024**

**BETWEEN
BANKING INSURANCE AND FINANCE UNION (K) CLAIMANT
AND
THAMANI SAVINGS AND CREDIT SOCIETY LIMITED RESPONDENT**

JUDGMENT

1. It is common ground that the parties herein executed a Recognition Agreement on 28th January 2014. On 25th May 2022, the Respondent through its Advocates on record, informed the Claimant of its intention to terminate the said Recognition Agreement. To this end, the Respondent issued the Claimant with a six months termination notice. The Claimant protested the notice of termination through its letter dated 21st June 2022. In the said letter the Claimant contended inter alia, that the Recognition Agreement could only be terminated in accordance with the [Labour Relations Act](#).
2. Through a letter dated 11th January 2023, the Claimant forwarded its Collective Bargaining proposals for the period beginning 1st January 2023 to 31st December 2024. The Claimant requested for the Respondent's counter proposals and a date to commence negotiations. The Claimant followed up with another letter dated 8th March 2023, requesting for the Respondent's counter-proposals and proposing a date to commence negotiations. Through an email dated 20th March 2023, the Respondent informed the Claimant that it was not possible to meet on 21st March 2023 as proposed. From the record, there is no further correspondence between the parties over the issue.
3. According to the Claimant, the Respondent suddenly stopped effecting union dues as of January 2023 without any lawful cause in total violation of Section 48(3) of the [Labour Relations Act](#).
4. Apparently, it is the foregoing series of events that triggered the instant suit through which the Claimant now seeks the following reliefs against the Respondent:



- a. That the Claimant/Applicant prays to the Honourable Court to order the Respondent to comply with the law on deduction and remittance of trade union dues from all the unionisable employees to the Claimant/Applicant union's bank account number 0102074144800 at Standard Chartered Bank, Harambee Avenue Branch, Nairobi with effect from January 2023 to date.
 - b. That the Claimant/Applicant further prays this Honourable Court to restrain the Respondent from harassing, intimidating or threatening employees with dismissal for joining/ belonging to and/or carrying out activities of the trade union.
 - c. That the Respondent be compelled to enter into collective bargaining agreement negotiations with the union on behalf of the unionisable employees as provided for in the current parties CBA, Recognition Agreement and the law.
 - d. That the Respondent pay costs of this claim.
 - e. That any other orders this Honourable Court may deem expedient and justifiable to grant in the interest of justice.
5. The Respondent has opposed the Claim through its Memorandum of Response in which it avers that the Recognition Agreement no longer exists having been terminated through the notice issued on 25th May 2022. According to the Respondent, the Recognition Agreement stood terminated upon expiry of six months from the date of the notice as no party filed any dispute in accordance with the provisions of the Labour Relations Act. The Respondent has further denied acting contrary to the provisions of Section 48(3) of the Labour Relations Act. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
6. During the trial which proceeded on 7th December 2023, both parties called oral evidence.

Claimant's Case

7. The Claimant called oral evidence through Mr. Isaiah Munoru Mucheke who testified as CW1. Mr. Munoru adopted his witness statement to constitute his evidence in chief. He further produced the documents filed by the Claimant as exhibits before Court.
8. Mr. Munoru told the Court that on 9th March 2023, the Respondent's CEO informed the Claimant through the phone that they would not be negotiating any Collective Bargaining Agreement (CBA) and neither would they be remitting union dues. That further, the Respondent had asked the unionisable employees who are interested in belonging to the Union to remit their own dues to the Union in person.
9. According to Mr. Munoru, the Respondent has been trying every tactic to remove the employees from the Union in order to avoid CBA negotiations and union representation.
10. After the expiry of the CBA for the period 2019/2020, the Respondent had tried to remove the Claimant's members from the Union to avoid negotiating a CBA vide their letter dated 2nd February 2021. As a result, the Claimant moved the Court through ELRC Cause E167 of 2021 and the matter was settled by consent.
11. He further stated that the Respondent has not given any reasons as to why they would wish to terminate the Recognition Agreement nor have they given any reasons as to why they are denying the Claimant's members their constitutional right to the CBA benefits and trade union membership and representation.



12. Mr. Munoru contended that the Respondent cannot be allowed to continue with its anti-union activities which has seen some of the Claimant's members resign from employment due to frustrations and its shop stewards resigning from their leadership positions due to threats and harassment.
13. In Mr. Munoru's view, the Respondent should be compelled to pay the union dues in arrears from their resources as it is due to their defiance that the same has not been remitted and deducting the same from the Claimant's members will add unnecessary burden to them.

Respondent's Case

14. The Respondent called oral evidence through Ms. Rose Kithinji, who testified as RW1. She identified herself as the Respondent's Chief Executive Officer and at the outset, sought to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.
15. It was Ms. Kithinji's evidence that the Respondent has never refused to meet the Claimant to negotiate on the CBA for 2023/2024. She further denied ever stating on phone that the Respondent was not interested in negotiations and or remitting union dues to the Claimant.
16. She further averred that the ELRC Cause E167 of 2021 was amicably settled by way of a written consent and reference to the contents thereof is irrelevant to the proceedings in this case.
17. Ms. Kithinji further stated that under Section 54(5) of the *Labour Relations Act*, a Recognition Agreement may be terminated/revoked by the National Labour Board. That at the time of issuing the notice of termination of the Recognition Agreement to the Claimant, the National Labour Board was not constituted.
18. She averred that the Board was reconstituted and gazetted on 2nd May 2023 giving way for the application for formal termination of the Recognition Agreement thereby vacating this Honourable Court's jurisdiction to determine this matter.
19. According to Ms. Kithinji, the Respondent never refused, attempted /or failed to deduct and remit union dues for unionizable employees or harbouring a ploy to remove the Claimant's members to avoid CBA negotiations and or deny its employees' enjoyment of their rights under Article 41 of *the Constitution*.
20. She further averred that the notice of termination issued by the Respondent was informed by the fact that most of its unionizable employees resigned, were promoted to management level, withdrew their membership from the Union, were due to retire or were employed under contract terms and had given instructions to the Respondent not to deduct and remit their union dues in exercise of their rights to join and leave the Union.
21. In Ms. Kithinji's view, the Respondent has not engaged in anti-union activities and the resignation of its employees from the Claimant Union is voluntary in expression of their rights under Article 41 of *the Constitution*.
22. She further termed the Claim premature and urged the Court to dismiss the same with costs.

Submissions

23. The Claimant submitted that it is illegal and unlawful for an employer to unilaterally stop deductions of the trade union dues from the union members who have not resigned from the Union in writing and a copy of the Resignation letter (s) forwarded to the Union by the employer. The Claimant posited



that there were no resignations from its members in real terms, but a gimmick by the Respondent to deny the employees their constitutional rights of union representation and CBA benefits.

24. It was the Claimant's further submission that there were no formal resignations from its members. In support of this position, the Claimant cited the case of Banking Insurance and Finance Union (Kenya) v Middle East Bank (k) Ltd.
25. The Claimant further submitted that it still has a valid Recognition Agreement with the Respondent. It was its position that the CBA is due for review. On this score, the Court was invited to adopt the position taken by the Court in the case of Civicon Limited v Amalgamated Union of Kenya Metal Workers.
26. On the Respondent's part, it was submitted that the procedure under Section 48(6) of the Labour Relations Act is clear that upon receipt of the notice of intention to terminate the Recognition Agreement, the Claimant was supposed to refer the dispute for conciliation in accordance with the provisions of Part VIII. In this regard, the Respondent submitted that the Claim herein is premature for the reason that the Claimant filed the same before referring the dispute for conciliation. In support of this position, the Respondent placed reliance on the case of Kenya Union of Entertainment and Music Industry Employees v Bomas of Kenya Limited and Civicon Limited v Amalgamated Union of Kenya Metal Workers (2016) eKLR.
27. The Respondent further submitted that the Recognition Agreement was no longer operative due to the diminishing number of unionizable employees on account of Resignations from employment, retirement, promotions to management level, employment on contract, retirements and withdrawals from union memberships.
28. The Respondent stated in further submission that the rights of employees under Article 41 and Section 4 of the Labour Relations Act to form, join, participate and or leave the Union are well protected and belong to the workers and not the Union.
29. It was the Respondent's position that the Claimant failed to discharge its burden of proving the allegations of intimidation and harassment particularly evidence from the affected employees, if any. According to the Respondent, the allegations to that effect are unfounded.

Analysis and Determination

30. I have considered the pleadings, the evidence tendered by both sides as well as the rival submissions and find the issues falling for determination as being:
 - a. Whether the Claimant has moved the Court prematurely;
 - b. Whether the termination of the Recognition Agreement by the Respondent was unlawful;
 - c. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant has moved the Court prematurely

31. The Respondent holds that the Claimant has moved this Court prematurely. In this regard, the Respondent has argued that upon receipt of the notice of intention to terminate the Recognition Agreement, the Claimant was supposed to refer the dispute for conciliation in accordance with the provisions of Part VIII of the Labour Relations Act. Notably, the Claimant did not submit on this issue.
32. Section 54(6) of the Labour Relations Act which is significant in this regard, provides as follows:



- 54(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII. (7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.
33. It is worth noting that the aforementioned statutory provision flows from Section 54(5) which requires an employer, group of employers or employers' association to apply to the National Labour Board for termination of or revocation of a Recognition Agreement.
34. Therefore, the requirement for reference of the dispute for conciliation presupposes that the employer has already complied with the provisions of Section 54(5) and a dispute has ensued from the said application. In this case, there is no evidence that the Respondent applied to the National Labour Board to terminate the Recognition Agreement. Therefore, the process envisaged under Section 54(6) could not kick in.
35. On this issue, I am fortified by the determination of the Court in *Kenya National Union of Teachers (KNUT) v Nancy Njeri Macharia & another* [2020] eKLR where it was held that:
- “It is therefore my view that the administrative machinery would commence with the employer issuing notice to the Board. That any notice sent under the recognition agreement prior to the authority of the National Labour Board is premature as the approval of the Board is a statutory precondition to the termination of the recognition agreement.
- In this context, the respondent cannot accuse the claimant of coming to court prematurely where it is the one that has issued the notice prematurely. Section 54(5) does not provide for the union to apply to the Board and so the union cannot commence the machinery provided under Section 54(5) by going to the board.
- It would therefore be logical for the union to come directly to court as the respondents have issued an irregular notice of termination without first complying with the requirements under Section 54(5) of the Act.”
36. Besides, the provisions of Section 54 ought to be read with Section 74 of the *Labour Relations Act* which provides for urgent referrals to court where a dispute concerns recognition.
37. In light of the foregoing, it is this Court's finding that the Claim was not filed prematurely.

Whether the termination of the Recognition Agreement by the Respondent was unlawful

38. It is apparent from the record that the bone of contention in this case is the termination of the Recognition Agreement as communicated through the Respondent's letter dated 25th May 2022.
39. According to the Respondent, most of the unionisable employees had resigned and retired while some had been promoted to management level.
40. Section 54(1) of the *Labour Relations Act* provides as follows:
- 54(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
41. It is thus clear under Section 54 (1) of the *Labour Relations Act* that recognition is earned by a trade union attaining the simple majority in terms of membership. Be that as it may, where the



membership falls below the minimum threshold, an employer is required to apply for termination of the Recognition Agreement to the National Labour Board pursuant to Section 54(5) of the [Labour Relations Act](#) which provides as follows:

(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

42. This provision was amplified by the Court of Appeal in the case of *Micato Safaris v Kenya Game Hunting & another* [2017] eKLR, thus;

“19. Although the appellant argued that the notices that it issued were in compliance with section 54 (5) of the [Labour Relations Act](#), we do not agree that it was the appropriate method for terminating or revoking the Recognition Agreement. The appellant simply gave notices of termination of the Recognition Agreement and stoppage of deduction and payment of agency fees immediately upon expiry of the notice periods of 90 days and 30 days respectively.

20. Under section 54 (5) the appellant was required to “apply to the Board to terminate or revoke” the Recognition Agreement. An application is different from a notice. According to Black’s Law Dictionary, Ninth Edition “to apply” is to “make a formal request,” whereas a “notice” is defined as a “legal notification required by law or agreement, or imported by operation of law as a result of some fact.”

43. And further, in the case of *Kenya National Union of Teachers (KNUT) v Nancy Njeri Macharia & another* [2020] eKLR, it was held that:

“Under Section 54(5) it is the employer to apply to the Board to terminate or revoke a recognition agreement. My understanding is that before the employer can give notice of termination, it would first have to apply to the Board and it is only after the Board has granted authority to terminate that it would give notice as provided under Clause 2 of the Recognition Agreement. This is because the Section does not make any reference to either party terminating the recognition agreement at their own level.”

44. In this case, there is no evidence of compliance with the requirements of Section 54(5) of the [Labour Relations Act](#) as the Respondent only issued the notice of termination dated 25th May 2022.

45. It is worth pointing out that the Respondent exhibited a copy of a letter addressed to the State Department of Labour, Ministry of Tourism and Wildlife, communicating its intention to terminate the Recognition Agreement. However, it was not made clear to the Court whether the reference to the Ministry of Tourism and Wildlife, was an inadvertent error as the Respondent did not indicate as much.

46. Be that as it may, it is notable that the letter was not addressed to the National Labour Board which is an Institution established under Section 5 of the [Labour Institutions Act](#). Therefore, and with tremendous respect to the Respondent, the said letter does not suffice and cannot be deemed to be an application made in accordance with Section 54(5) of the [Labour Relations Act](#).

47. Applying the provisions of Section 54(5) of the [Labour Relations Act](#) and the determination in *Micato Safaris v Kenya Game Hunting & another* [supra] and *Kenya National Union of Teachers (KNUT)*



v Nancy Njeri Macharia & another [supra] to the case herein, it is clear that the Respondent did not invoke the right procedure in terminating the Recognition Agreement executed on 28th January 2014.

48. The bottom line is that the notice of termination issued by the Respondent on 25th May 2022 was not sufficient to terminate the Recognition Agreement.
49. Accordingly, I return that issuance of the notice of termination by the Respondent to the Claimant was not sufficient to terminate the Recognition Agreement. Therefore, the said termination was not valid hence was unlawful.

Reliefs?

Collective Bargaining Agreement Negotiations

50. The Claimant has sought an order to compel the Respondent to enter into CBA negotiations on behalf of unionisable employees.
51. Section 57 (1) of the *Labour Relations Act* requires an employer that has recognised a trade union to conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the Recognition Agreement.
52. As the Court has found that the termination of the Recognition Agreement by the Respondent was not valid, there is no reason why the parties should not enter into negotiations with a view to concluding a Collective Bargaining Agreement.

Deduction and Remittance of Union Dues

53. In support of its case, the Respondent exhibited letters from its employees who had resigned from employment, retired and those whom it had promoted to management level at job group E. The Claimant further exhibited letters from its employees who had resigned from the Union.
54. It is therefore apparent that two employees of the Respondent who were members of the Claimant resigned from employment while one retired. Further the employment contracts of three employees who were on fixed-term contracts ended.
55. What I note with concern is that there is no evidence that the employees who were appointed to managerial levels had tendered their respective resignations from the Claimant Union.
56. Notwithstanding the promotions, the Respondent had no right to infer that the said employees had opted out of membership of the Claimant Union. As such, the Respondent had no right to stop union deductions of the said employees without their express intention to leave the Union.

Harassment and intimidation of the Respondent's employees on account of their participation in the activities of the Claimant Union.

57. The Respondent exhibited a copy of the resignation letters of some of its employees from the Claimant Union. I will sample a few. In her letter dated 1st October 2022, Dorcas Kendi Muthee, states that her resignation was following wide consultation and that she did not want to do anything against her employer's wish.
58. In the case of Alice Njoki Kariuki, she stated that she was withdrawing due to pressure from other staff members.



59. It is also worth noting that save for Christine Mukami Njeru, all the employees resigned day on the same day, that is 1st October 2022.
60. What manifests from the foregoing is that it is more than probable that the resignations from the Union were not voluntary. As such, I do not find the Claimant's allegations in respect of harassment and intimidation of its members with regards to their union membership, as being remote and farfetched.
61. Article 41 of *the Constitution*, guarantees every worker the right to join a union and participate in the activities of the union. Consequently, harassment or victimisation of an employee on account of their union membership is a direct constitutional violation and goes to the root of Article 41 and the constitutional right to associate guaranteed under Article 36.
62. In this regard, an employee who wishes to join a union should not be subjected to any form of harassment, threats or intimidation. Similarly, an employee of a union should not be coerced to relinquish their union membership.

Order

63. It is against this background that the Claim succeeds and the Respondent is directed to:
 - a. Resume deductions and remit to the Claimant's gazetted bank account, dues from its employees who are members of the Union.
 - b. Enter into negotiations with the Claimant Union on behalf of the unionisable employees with a view to concluding a Collective Bargaining Agreement.
 - c. Restrain from taking any action that may reasonably be construed as harassment, intimidation or threat of its employees on account of their union membership or participation in union activities.
 - d. In view of the nature of the dispute herein, the Court will make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Odero

For the Respondent Mr. Mageto

Court assistant Millicent Kibet

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 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.

