



Kenya Engineering Workers Union v Garage and Industry Limited (Employment and Labour Relations Cause E040 of 2023) [2024] KEELRC 703 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 703 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E040 OF 2023**

**AN MWAURE, J
MARCH 20, 2024**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
GARAGE AND INDUSTRY LIMITED RESPONDENT**

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 16th January 2023.

Claimant's Case

2. The Claimant avers that the parties herein have a valid and duly signed Recognition Agreement in place and have negotiated and registered a Collective Bargaining Agreement (CBA) on terms and conditions of service of the Respondent's unionizable employees.
3. The Claimant avers that upon registration of the CBA, it expected the salary increment of the Respondent's unionizable employees but to its surprise the Respondent reduced their salaries and those who declined to sign for the reduction were declared redundant.
4. The Claimant avers that the Respondent's action was unfair, unprocedural without considering the parties Recognition Agreement, CBA, the *Employment Act* and *the Constitution*. It was also in violation of the Tripartite Resolutions reached with the Labour Ministry, Federation of Kenya Employers (FKE) and Central Organisation of Trade Unions (COTU K) on Covid 19.
5. The Claimant avers that the Respondent unfairly and unlawfully declared the workers representatives Simon Mbogo and Daniel Waweru (grievants) redundant after they refused to sign the reductions and forced the other employees to sign on the salary reduction and alleged withdrawal letters.



6. The Claimant avers that the grievants were employed on 03.01.2005 and terminated on 28.05.2020. Simon was working at a Sheet Metal at a basic salary of Kshs 39,931.77 and house allowance of Kshs 5,507.83 while Daniel was a Welder at a basic salary of Kshs 26,769.25 and house allowance of Kshs 3,692.31.
7. The Claimant avers that it initiated dialogue as per the CBA and Recognition Agreement but the Respondent declined. It therefore invoked Section 62 of the [Labour Relations Act](#) by reporting a trade dispute to the Labour Ministry.
8. The Claimant avers that the dispute was accepted under reference MLSP/LD/IR/13/47/2020 of which Mr Laurent Mulwa of Industrial Area Labour Office was appointed to conciliate parties. The conciliator issued parties with a Certificate of Unresolved Trade Dispute as stipulated under Section 69 and 74 of the [Labour Relations Act](#).
9. The Claimant avers that the tabulation of the unprocedural redundancy failed to consider the CBA on salaries, selection criteria of redundant employees and salary arrears.

Respondent's Case

10. In opposition to the Claim, the Respondent filed its response dated 10th March 2023.
11. The Respondent avers that upon registration of the Recognition Agreement and CBA, it had a good relationship with the Claimant and its employees. It consistently deducted union dues from unionisable employees and remitting the same to the Claimant.
12. The Respondent avers that on or about 2020, it was informed that the remaining 6 of its employees who were members of the Claimant withdrew their membership of the union vide withdrawal letters dated 02.06.2020. The Claimant and Labour Officer were duly notified of the withdrawals.
13. The Respondent avers that upon the withdrawal from the union, the Respondent would not deduct union fees from subject employees and remit the same to the Claimant union as it would be unlawful.
14. The Respondent avers that the withdrawal of the employee's membership from the Claimant union was voluntary and there was no coercion or duress for itself or its officials.
15. The Respondent avers that if there was reduction or declaration of redundancy of any employee, such employee was not a member of the union and the same was occasioned by effects of the global outbreak of the covid-19 pandemic. Further, it was carried out in strict conformity to the law and with prior engagement of the affected employees.
16. The Respondent avers that save the correspondences exchanged between the parties, there was no attempt made by the Claimant to invoke the conciliation process set out in the [Labour Relations Act](#).

Claimant's Submissions

17. The Claimant submitted that the Respondent has agreed that it declared its employees redundant and reduced salaries to the remaining set with allegation of involving the Ministry of Labour with no evidence of such notification.
18. The Claimant submitted that the Respondent accepted registration of the CBA but no proof was filed in court to confirm its implementation or reduction of salaries.
19. The Claimant submitted that pursuant to section 48 and 49 of the [Labour Relations Act](#), the Respondent had a duty to effect agency fees if any withdrawal was made but the Claimant's members



have not withdrawn their membership as purported by the letters produced in court. It wonders how the Respondent came to know of the withdrawal yet the letters were not copied to them. Further the notices were not in line with section 48(6)(7)and(8) of the [Labour Relations Act](#).

20. The Claimant submitted that the Respondent is still bound by the CBA even if its employees might have withdrawn as read on section 59(2) that: “A Collective Agreement shall continue to be binding an employer or employees who were parties to the Agreement at the time of its commencement from that trade union or employer association.” This position is mandatory and final.
21. The Claimant submitted that the reduction of salaries instead of an increment as per the CBA was unprocedural and unlawful.

Respondent’s Submissions

22. It is the Respondent’s submission that the deduction of agency fees as sought would fail the statutory test as the Claimant has not led any evidence before this court that shows that the same was gazetted by the Minister or has evidence for the statutory basis of the 2% produced before this court. Further, such fees is liable as against the employees and not the employer.
23. The Respondent submitted that no evidence has been presented by the Claimant to rebut the evidence of the Respondent that some of its employees who were initially members of the Claimant withdrew their membership from the union. The Respondent admits it was notified by the employees by being served with the withdrawal letters which were served upon and duly stamped by the Claimant union.
24. The Respondent submitted that pursuant to Section 48(6) of the [Labour Relations Act](#), upon withdrawal of membership of its employees from the Claimant union and being duly notified of the same, the Respondent was legally barred from making any deductions from the said employee’s salaries and remitting it to the Claimant.
25. The Respondent submitted that the Claimant has not led any evidence in proof of the alleged redundancy of two of its employees, Simon Mbogo and Daniel Waweru. The Claimant neither attached any notice in proof of the alleged termination or an affidavit from the said employees confirming that they were terminated or declared redundant.

Analysis and Determination

26. Having considered the pleadings, submissions and the evidence of record, the issues for determination are:
 - a. Whether the grievants were declared redundant
 - b. Whether the Respondent should re-effect deduction and remittance of union dues.
 - c. Whether the Respondent should effect agency fee after withdrawal from the Claimant union.

Whether the grievants were declared redundant

27. The Claimant union averred that the Respondent unfairly and unlawfully declared the workers representatives Simon Mbogo and Daniel Waweru (grievants) redundant after they refused to sign the reductions. However, as submitted by the Respondent, the Claimant union neither attached any notice in proof of the alleged of termination or affidavits from the said employees confirming that they were terminated or declared redundant. In other words there is no proof that the two were declared redundant and if so there is no redundancy notice.



28. Further, the grievants were not produced before this court to testify and produce evidence to that effect. Section 107 of the *Evidence Act* states:

- “(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.
- (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.”

29. Also Section 47(5) of the *Employment Act* deals on burden of proof in employment disputes which reads:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

30. Accordingly, the Claimant union failed to prove that the two grievants were firstly employees of the Respondent and that they were indeed terminated on grounds of redundancy as alleged. There are no documents to establish employment terms and notification of deduction of their salaries and also notification of redundancy. Mere allegations cannot be relied on in court to prove a case.

Whether the Respondent should re-effect deduction and remittance of union dues.

31. Section 48 of the *Labour Relations Act*, clearly lays down the terms on deduction and remittance of union fees as follows:

- “(1) In this Part "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.
- (2) A trade union may, in the prescribed form, request the Cabinet Secretary 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 Cabinet Secretary 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.
- (4) The Cabinet Secretary may vary an order issued under this section on application by the trade union.



- (5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.
- (6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.
- (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.
- (8) An employer shall forward a copy of any notice of resignation he receives to the trade union.”

32. It is not in dispute that the parties have a valid recognition agreement and CBA in place. However, the Respondent submitted that it is estopped by law from remitting any union dues to the Claimant union as the remaining employees who were members of the union withdrew their membership. Section 48(6) of the [labour relations act](#) obviously estoppel the respondent from deducting union dues from members who have resigned from the union.

33. The Claimant union however asserts that upon registration of the CBA, the Respondent reduced the employees’ salaries and those who declined to sign were declared redundant. The Respondent is accused that he went ahead to force further the remaining workforce to sign withdrawal letters.

34. From the Claimant union’s submissions, it does not deny that it now does not have the privilege of membership from the Respondent’s employees but alleges that the employees were coerced to withdraw their membership.

35. As discussed above, Section 107 of the [Evidence Act](#) clearly underpins that he who alleges must prove. This court takes note that the Claimant union attached the withdrawal notices of its members in its list of documents which do not aver to any coercion, further, it did not file any affidavit from the said employees to prove the allegation of coercion. Justice Abuodha held in *Banking, Insurance & Finance Union (Kenya) v Taifa Sacco Society Ltd* [2014] eKLR thus:

“Section 11 of the [Labour Relations Act](#) places the burden of proof on the person who alleges that a right or protection conferred by the Act has been infringed. Apart from reading mischief in the withdrawal letters, the claimant has not shown by way of affidavit or correspondence any attempt to enter the respondents promises around the time of this alleged forceful withdrawal to verify the fact.”

36. The withdrawal notices were duly served to the union as it has acknowledged receipt vide its stamp and thereafter the letters served to the employer in accordance with Section 48 of the [Labour Relations Act](#).

37. In view of the foregoing and with due regard to Section 48(6) of the [Labour Relations Act](#), the Respondent cannot proceed to deduct union dues for its employees as they are no longer members of the union. The members who have resigned from the union therefore should not have their union dues deducted.



Whether the Respondent should effect agency fee after withdrawal from the Claimant union.

38. Section 49 of the Labour Relation Act provides the requirements for deduction of agency fees as follows:

- “(1) A trade union that has concluded a collective agreement registered by the Employment and Labour Relations Court with an employer, group of employers or an employers’ organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Cabinet Secretary to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.
- (2) A request in accordance with sub-section (1) shall—
- (a) be signed by the authorized representatives of the trade union and employer, group of employers or employers’ organisation;
 - (b) supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;
 - (c) specify the amount of the agency fee, which may not exceed the applicable trade union dues; and
 - (d) specify the trade union account into which the dues shall be paid.
- (3) An employer in respect of whom the Cabinet Secretary has issued an order as specified in subsection (1) shall commence deducting agency fees from the employees named in the Cabinet Secretary’s notice within thirty days of receiving the Cabinet Secretary’s notice.
- (4) The Cabinet Secretary may vary an order issued under this section on application by the trade union and the employer, group of employers or employers’ organisation concerned.
- (5) A member of a trade union covered by a collective agreement contemplated by subsection (1) who resigns from the union, is immediately liable to have an agency fee deducted from his wages in accordance with this section.
- (6) If a collective agreement is implemented retrospectively after registration by the Industrial Court, the agency fee shall be deducted and paid to the trade union for the period of retrospective implementation in accordance with this section.”

39. This court is further guided by Hon. Justice Ongaya’s judgment in Kenya Quarry and Mine Workers Union vs Kenya Builders & Concrete Co. Ltd [2020] eKLR:-

“Deduction of agency fees is governed by section 49 of the *Labour Relations Act*, 2007. The section requires the claimant to request the Minister to issue an order requiring the respondent to deduct agency fees from wages of each unionisable employee covered by the collective agreement who is not a member of the union. Agency fees will then be deductible from the employees named in the Minister’s notice within 30 days of receiving the Minister’s



notice. The Court finds that the claimant has not shown that it requested for the Minister's order and obtained the same. The Court returns that the claimant has not satisfied the statutory requirement for deduction of agency fees. For that reason alone, the suit must fail."

40. The court has considered the pleadings, submissions and citations of the rival parties. Having done so the court holds that the claimant has not proved its claim dated 16th January 2023. The same is therefore dismissed and the prayers therefore from paragraph 4.1 to 4.5 are declined.

41. Court orders each party to meet their respective costs hereto.

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

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

