



**Banking Insurance and Finance Union v Consolidated Bank of Kenya Limited
(Cause E728 of 2022) [2024] KEELRC 654 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E728 OF 2022
NJ ABUODHA, J
MARCH 14, 2024**

BETWEEN
BANKING INSURANCE AND FINANCE UNION CLAIMANT
AND
CONSOLIDATED BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant a registered trade union filed its statement of claim dated 13th October, 2022 pleaded inter alia as follows: -
 - a. The Claimant averred that the Respondent and itself have a valid recognition agreement signed in the year 2000 to regulate the relationship between the parties in dealing with the workers terms and conditions of the service.
 - b. The Claimant averred that as a result of the Recognition Agreement parties have continually entered in to collective agreement negotiations and the same have been concluded and the resultant document registered in the Employment and Labour Relations Court of Kenya.
 - c. The Claimant averred that at the preamble clause of the said CBA the parties have agreed that employees of the bank will be divided in to management staff and unionisable employees.
 - d. The Claimant averred that in accordance with the Recognition Agreement and the CBA the employees were at liberty to join the Claimant and after the membership the Respondent is expected to deduct and remit union dues to the Claimant as a confirmation of continued membership to the union.
 - e. The Claimant further averred that the remittances of union dues to the Claimant have been implemented by the Respondent over the years without any issues.



- f. The Claimant averred that in 2017 the Respondent unfairly terminated the services of 9 members of the Claimant. That the matter was taken up by the union and filed in court. That after the filing of the suit the Respondent resorted to systematic conscription of union members from union membership with only four remaining down from 109 members.
 - g. The Claimant averred that the action by the Respondent was tactful maneuver of unlawfully dismembering union members and denying them union representation and CBA benefits. That a union member could only resign from the union by writing and an employer has no right to stop the remittances of an employee's union dues without his/her resignation.
 - h. The Claimant averred that the law requires the employer that if the union member resigns from union membership a copy of that letter of resignation should be send by the employer to the trade union. That since 2017 to date the Claimant has never received any resignation letters from the Respondent as a confirmation that any of its members have resigned from union membership.
 - i. The Claimant averred that in any case the Constitution of Kenya 2010 confirms that every worker is at liberty and has absolute right to form, to join and to participate in the activities and programmes of a trade union. That the Claimant finds the Respondent action of conscripting employees out of union a bad labour practice, unlawful and by all means unconstitutional.
2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. The court to find and declare that the Respondent's action of removing employees from union membership by unilaterally stopping the remittances of their union dues unlawful and unconstitutional.
 - b. The Court to order the Respondent to remit all the union dues from all the unionisable employees, that the Respondent has unilaterally removed from union membership and to henceforth deduct and remit to the union the prescribed union dues from all the union members who were illegally removed from union membership.
 - c. The Court to deduct and remit Agency fees from all the unionisable employees who are covered by the CBA but are not members of the Claimant as required by section 49(10) of the Labour Relations Act,2007.
 - d. The court to order the Respondent to adhere to the provisions of the Recognition Agreement and preamble clause of the CBA with regard level of union representation.
 - e. Costs of the suit.
 3. The Respondent in reply filed its statement of Response dated 25th November,2022 and averred inter alia as follows: -
 - a. The Respondent acknowledged that it is a member of the Kenya Bankers Association (KBA) which has a Recognition Agreement dated 4th October,2000 with the Claimant and a collective Bargaining Agreement (CBA) dated 19th August,2021.
 - b. The Respondent averred that it had a right to promote its employees under clause 17(a) of the Recognition Agreement as read together with Appendix "B" and clause 7(c) as one of management methods which is not subject for negotiation between the Respondent and the union. In addition, matters for negotiation are espoused under clause 16 and clause 15 and 18 provides for grievance resolution mechanism.



- c. The Respondent averred that the Claimant has therefore not exhausted the internal dispute resolution mechanism provided for in the recognition Agreement hence this court lacks jurisdiction to hear and determine this claim.
 - d. The Respondent averred that it is a law-abiding institution that respect and uphold the rights and fundamental freedoms of its employees including their freedom of association. That it has always deducted and remitted all union dues for its employees who are members of the Claimant to the Claimant's accounts as required by law.
 - e. The Respondent averred that in exercise of its managerial powers and complying with law terminated the employment of 9 employees in 2018 subject of cause 2330 of 2330 pending before the court. That upon termination of the former employees the Respondent obligation to remit their union dues to the Claimant ended. The Respondent however continued to deduct and remit union dues for all the remaining members of the Claimant.
 - f. The Respondent averred that the Claimant's allegations that it started conscripting its members out of the union after the institution of the case was false and unfounded and only meant to taint the Respondent' image and reputation.
 - g. That the Claimant could not expect its membership to remain constant when there were many factors that affect the numbers like resignation, termination of employment, promotion of employees to managerial positions among others. That it was the Claimant's responsibility to ensure growth of its membership by selling its agenda and recruiting more unionisable employees. The Claimant cannot blame its failure to recruit more members and sell its agenda on the Respondent.
 - h. The Respondent averred that it has right to determine the terms of new employees, including placing them under probation as and when circumstances demand. In addition, members were promoted to managerial cadres where they received better terms than they received before in line with strategic plan. That the Respondent' interest was to ensure its customers satisfaction and getting money for value while providing its employees with opportunity to grow professionally.
 - i. The Respondent averred that in promoting its meritorious employees to management cadres was ensuring fair labour practice, upholding the rights of its employees and ensuring its business continuity.
 - j. The Respondent averred that clause A4 of the CBA provides for promotion of clerks and subordinate staff to section head and the right of employee to decline or accept the Promotion. That all promoted employees exercised their freedom of choice and none declined the promotions; they all accepted. That the Claimant cannot fault the Respondent for prioritizing its interests and those of its employees not the employees' choice to accept the promotion as provided for in the CBA.
4. The Respondent averred that from the prayers sought that it has been deducting and remitting all union dues to the Claimant's accounts. That the Claimant's relation with the Respondent is governed by the CBA and the Claimant has not pointed out any clause of the CBA the Respondent has breached. That the Respondent has not named or listed any of its members whose union dues have not been remitted or the unionisable employees whose agency fees is payable as required by law.
 5. The Respondent averred that the Claimant has not exhibited any complaint from its unionisable employees complaining of their promotion to management cadres with enhanced terms from their



- clerical cadres. That the decrease of Claimant's membership was due to termination and promotion of employees which is well anchored in law.
6. The Respondent averred that there was no dispute to warrant intervention of this court and the Claimant's claim should be dismissed with costs.
 7. The court on 29th September, 2023 upon perusal of the documents by the parties noted that the issue in dispute was deduction of union dues and agency fees. The Court was of the view that the documents speak for the parties position and there may be no need to call witnesses to repeat what was already on record.
 8. By consent of the parties the matter was to be disposed of by written submissions with Respondent's counsel being at liberty to canvas his PO in his submissions.

Claimants' Submissions

9. The Claimant filed its written submissions dated 18th October, 2023 and on the issue of whether it's members were illegally and unlawfully removed from union membership submitted on 48(6)(7) and (8) of the *Labour Relations Act* on how union members may resign from the union and what the employer was required to do in the circumstance. That is to say the employee had to give notice in writing, yet out of the 110 members recruited in the year 2018, none of them had formally resigned from union membership. The Claimant had not received a single resignation letter yet the respondent claimed the membership had since dropped to 4 members in the year 2022. According to the claimant, unionisable employees were identified not by the titles they held but by the roles they performed in the bank. Banks were left at liberty to give their employees whatever titles they wished as per each bank's business needs at the joint negotiation council meeting.
10. The Claimant further submitted that the preamble to the CBA set out the roles which were unionisable including section heads, check clerks, clerical staff among others. That the employees who carried out the above listed roles in the Respondent bank could not be cosmetically called management staff as purported by the Respondent and further that the above roles could not be performed by only 4 employees alleged by the respondent. It was the claimant's submission that the Respondent employees who carried out the above roles were unionisable and therefore at liberty to join the Claimant union.
11. The Claimant submitted that the parties had a body called Joint Negotiating Council which was mandated to change any clause in the CBA and one member could not do so on its own. The Claimant submitted that the Respondent was determined to remove all unionisable employees from union membership in order to deny them union representation and CBA benefits.
12. The Claimant submitted that the Respondent admitted that due to negotiated salary increments in the CBA between the Claimant and KBA the wage bill was becoming unsustainable and therefore many union members were pushed from union cadres to management level so that the bank could take control of the salary movement. That the union members salaries were much higher than management salaries.
13. The Claimant submitted that by merely changing an employee title does not in real terms make the employee a management staff but the work the employee does in the bank. The same could not be termed as promotion but simply to device to remove such an employee from being a union member thus violating such an employees' right of union membership and freedom of association. Further that their salaries became lower on the alleged promotion than when they were unionisable.
14. On the issue of whether the members who were promoted to management were still carrying out unionisable employees' roles the Claimant submitted that such employees continued to carry out the



- roles of unionisable employees as captured in the preamble clause of CBA. That the title did not change their roles in the bank.
15. On the issue of whether the member removed from union membership where unionisable or not the Claimant submitted that the Respondent bank being a member of KBA was bound by the terms and conditions applicable to unionisable employees in the banking industry. That the parties to the agreement agreed that unionisable employees were those who carry out the roles in the CBA. For strange reasons the employees who carry out the said roles were removed or not allowed to join the union on the contention that they were not unionisable.
 16. The Claimant further submitted that currently there were only 4 union members who pay union dues out of a total of work force of 350 and the Respondent could not convince the court that all 346 employees were all carrying out management roles yet majority do the unionisable roles.
 17. The Claimant further submitted that the Respondent's action of unilaterally stopping the remittance of union dues and again failing to remit agency fees as required under section 49 of the [Labour Relations Act](#) was bad in law and only meant to drive the unionisable employees from their seat of justice and to deny them union representation and CBA benefits.
 18. On the issue of whether the Claimant was entitled to the prayers sought the Claimant submitted that it was entitled to the prayers sought. That the Respondent had admitted to having pushed the employees to management because of frequent salary and other allowances increments which were pushing wage bill over and above sustainability and further that the members were outside the union membership without their individual resignation or consent by themselves as per section 48(6) (7) and (8).
 19. Counsel further submitted that the Respondent had no justifiable reasons to remove union members from the enjoyment of their union membership and CBA benefits.

Respondent's Written Submissions

20. The Respondent filed its submissions dated 31st October, 2023 and on the issue of whether the Claimant exhausted internal dispute Resolution mechanisms the Respondent submitted that the claim offended the doctrine of exhaustion of internal dispute resolution mechanism provided for under the recognition agreement. That the doctrine prohibited courts from hearing cases which could be resolved in some other fashion hence the court lacked jurisdiction to hear and determine this claim.
21. The Respondent placed its reliance on clause 4 of the recognition agreement which provided that grievances were to be resolved strictly as per section 15 and 18 through the Joint Consultative Committee established under clause 19. The Respondent relied on the case of *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR which stated that where employers and trade unions have a dispute the court has power to intervene however the court has to tread carefully in disputes over recognition and CBA. According to Counsel, the Claimant ought to have adhered to grievance procedures in the recognition agreement rather than rushing to court. That the dispute herein should have first been referred to the Joint Negotiating Committee under clause 19(f). The Respondent relied on the case of *Banking, Insurance and Finance Union(K) v KCB Bank(K) Limited; Dishon Ochieng Achiro and 70 Others (Interested Parties)* [2019] eKLR.
22. In addition, the Respondent submitted that clause 26 of the Recognition Agreement stated that observance of the Agreement is a condition of the continued recognition of the union by the Association. That the CBA is anchored on the acknowledgement of the Recognition Agreement by parties. That the Claimant missed a fundamental step before coming to court.



23. On the issues of whether management method is negotiable or non-negotiable the Respondent submitted that the Claimant by faulting the promotion of its employees was trying to inform and regulate how the bank should undertake selection, placement and mobility and general management process of its employees. That the Respondent had inherent and unfettered right to promote its employees as it deems fit as per clause 17 of the agreement as read together with Appendix “B” and clause 7(c). In this regard the Respondent relied on the case of Banking ,Insurance and Finance Union(K) v KCB Bank(K) Limited; Dishon Ochieng Achiro and 70 others(Interested Parties) Supra among others to justify the management method as being not part of negotiation between the Claimant and itself.
24. The Respondent submitted that the promotion of staff was aimed at enhancing professional growth and ensuring sustainability of the ever-rising wage bill in the harsh economic times. The same was introduced in 13th December,2011 and the Claimant was estopped from raising issue with its introduction ten years after.
25. On the issue of whether the decrease in the Claimant’s membership due to circumstances well anchored in law the Respondent submitted that it was the responsibility of the Claimant to sell its agenda and recruiting more employees. That there many factors which affect the Claimant’s membership like resignation, termination and promotion to managerial positions.
26. The Respondent also submitted that it had rights to determine the rights of new employees together with the current employees. The Respondent was cushioning itself from the rising wage bill by implementing alternative adaptive changes at the same time securing professional growth and better employment standards for its employees. That the Employees received better terms when promoted than before the promotion.
27. The Respondent relied on Clause A4 of the CBA on the promoted clerks accepting or declining the promotions. That none declined the promotions as all exercised their right of freedom of choice and accepted the promotions. There was no letter from unionisable employees complaining about decrease in terms after promotion to management cadres. That due to the said promotions the Claimant’s members have decreased from 106 in 2017 to 4 in 2022.
28. On the issue of whether the Claimant is entitled to the reliefs sought the Respondent submitted that the Claimant cannot expect it to remit dues of former employees whose employment ended legally out of operation of the law. The Respondent submitted that the Claimant had not named or listed any of its members whose union dues have not been remitted or the unionisable employees whose agency fees was payable as required by the law. The Respondent could not be faulted for contravening section 48 and 49 of the [Labour Relations Act](#) and that the claimant had not pointed out any clause of the CBA the respondent had breached.
29. In concluding its submissions the Respondent submitted that it adhered to [the Constitution](#), Recognition Agreement, the CBA and various sections of the [Labour Relations Act](#) hence the Claim ought to be struck out with costs to the Respondent. Further the Claim was not ripe for the Court as the Claimant did not exhaust internal dispute resolution mechanisms before filing the claim in court.

Analysis And Determination

30. The Court has reviewed and considered reviewed the submissions by both parties and the fundamental question that emerges and which must be resolved first is whether this claim is prematurely before the Court in that the claimant did not exhaust the internal dispute resolution mechanisms prior to the commencement of this suit.



31. A close look at clause 4 of the recognition agreement provided that members will act strictly in accordance with the procedure laid down herein and submit their claims or grievances through channels provided under this agreement. Clause 18 on the other hand provides for grievance procedure where any grievance is to be forwarded to the Joint Negotiating Council under clause 19.
32. Clause 20 provides that in case there is failure to reach a settlement at the Joint Negotiating Council the matter shall be referred by either party to the Ministry of Labour in accordance with Trade Disputes Act (234) (read [Labour Relations Act](#)).
33. In this case and from the record, no evidence was presented that showed that the Claimant attempted to invoke the internal dispute resolutions mechanisms provided for in the agreement or referred the dispute to the Minister for Labour in accordance with [Labour Relations Act](#). The Court in the case of Banking, Insurance and Finance Union(K) v KCB Bank(K) Limited; Dishon Ochieng Achiro and 70 Others (Interested Parties) (2019) eKLR held that:

Section 62 of the [Labour Relations Act](#) further provides for compulsory conciliation of all disputes between employers and trade unions. The dispute is only supposed to be filed in court after a conciliator has certified that conciliation process has failed..... I therefore agree with the Respondent and Interested Parties that this dispute was brought to this court prematurely before exhausting the process under the parties own dispute resolution machinery as set out in the Recognition Agreement and the process set out under [Labour Relations Act](#) on pre-court dispute resolution process.
34. The exhaustion principle is a fundamental principle of administrative law whose intention is to subject disputes to available formal or even informal dispute resolution mechanisms before they are placed before a court of law for determination. It is an acknowledgment that disputes resolved through the alternative dispute resolution mechanisms are more sustainable and long lasting than Court judgments which are costly and more often than not strain if not destroy relationships.
35. The Court of Appeal in the case of Speaker of National Assembly v Karume [1992] KECA 42 stated thus:

“Where there is a clear procedure for redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. See also Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others”
36. The issues raised by the claimant in the present suit are quite sound and valid. The Court is ready willing and able to decide them. However, the parties herein agreed on a pre-court process which ought to be exhausted before the Court can be seized of jurisdiction. This ought to be respected and adhered to by the parties. There was a good reason for it.
37. From the foregoing the Court hereby directs the parties herein to subject their dispute to the agreed internal dispute resolution mechanisms before invoking the jurisdiction of the Court.
38. The Court therefore directs that this dispute be processed in accordance with Clause 4 read together with clauses 18 to 19 of the Recognition Agreement between the parties. Such process to be concluded within 60 days of this Judgment and a report thereon filed in Court for final orders.
39. The matter is hereby set for mention on the 3rd day of June, 2024 for mention for purposes of recording final orders.
40. It is so ordered.



DATED THIS 14TH DAY OF MARCH, 2024

DELIVERED THIS 14TH DAY OF MARCH, 2024

ABUODHA NELSON JORUM

JUDGE

