Kenya Export Floriculture and Allied Workers Union v Bohemian Flowers Ltd; Kenya Plantation & Agricultural Workers Union (Interested Party) (Employment and Labour Relations Cause E006 of 2023 & Miscellaneous Application E161 (NRB) of 2023 (Consolidated)) [2024] KEELRC 1055 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1055 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2023 & MISCELLANEOUS APPLICATION E161 (NRB) OF 2023 (CONSOLIDATED)

HS WASILWA, J

APRIL 23, 2024

BETWEEN

KENYA EXPORT FLORICULTURE AND ALLIED WORKERS UNION ..... CLAIMANT

AND

BOHEMIAN FLOWERS LTD ..... RESPONDENT

AND

KENYA PLANTATION & AGRICULTURAL WORKERS UNION ..... INTERESTED PARTY

JUDGMENT

1. The suit herein was commenced by a Memorandum of claim dated 18th January, 2023 and Amended on 16th February, 2023, seeking the following reliefs; -

    1. That the Respondent to immediately commence deduction and remittance of trade Union dues to the claimant's specified account.

    2. That the Respondent to pay to the claimant from its own funds the un-deducted and unremitted union dues from the months the deductions were due to the judgement date in this matter.

    3. That the Respondent to sign Recognition agreement with the claimant within 30 days of Judgement.

    4. That the Respondent to pay the costs of this suit.

5. That the Honourable Court grant any other or relief it may deem fit and just to grant.

2. The claimant avers that it has recruited 2500 employees from the Respondent company into its membership through duly signed form 'S' in the month of December, 2022 and on 19th and 20th December, 2022. They submitted the form 'S' to the Respondent through the letter of 18th December, 2022, requesting the Respondent to commence deduction of Union dues.

3. He stated that they have complied with all recruitment procedures because they have recruited a simple majority, in that, at the time of submitting the form 'S', the Respondent had 3200 employees, therefore that they recruited about 65% of the Respondent's employees and therefore should be recognized by the Respondent.

4. After recruiting a simple majority, the claimant states that on 9th January, 2023, it forwarded draft copies of the Recognition agreement to the Respondent through Fargo courier and advance copy via email to the Respondent's Human Resource officer. In the letter, the claimant also requested for a meeting to be convened on 17th January, 2023 to discuss the terms of the agreement but the Respondent refused to honour the request.

5. The Claimant states that, when the Respondent refused to sign the recognition agreement, deduct and remit Union dues, the Respondent was in violation of Sections 4, 48 and 54(1) of the *Labour Relations Act*, Articles 2,3,8 and 11 of ILO Convention 87 on freedom of Association and Protection of the right to Organize and violation of Articles 36,41 and 47 of *the Constitution* of Kenya.

Respondent's case

6. The Respondent entered appearance through the firm of Okweh Achiando & Company advocates on the 5th February, 2023 and filed a response to claim on 27th July, 2023 denying the entire claim and in particular denying the allegations that the claimant recruited 2500 employees from its company and stated that if any such recruitment was undertaken then the same was illegal because the Respondent was not notified of the recruitment.

7. It is stated that the claimant purports to have recruited 2500 out of 3200 employees but did not tender any evidence in support of the members recruited vis a vis the unionisable employees at the Respondent.

8. The Respondent states that it did not received any recruitment forms or draft recognition agreement and even if the said recognition was to be served on them, they could not receive the same because they had already signed a recognition agreement with the interested party, Kenya Plantation and Agricultural Workers Union(KPAWU).

9. He added that since no permission was sought verbally or in writing by the claimant, any recruitment conducted was done in violation of Section 56(1) of the *Labour Relations Act* as read with Article 41 of *the Constitution*.

10. The Respondent also stated that as per section 48 of the Labour Relations Court, the Minister for labour ought to first make an order requiring the employer to deduct Union dues from employees who are members of Union. Therefore, that since no such Order was served on them, they could not act.

11. He contends that the omission to obtain an Order from the minister went to the root of the Respondent's power to deduct and remit the Union dues and affected the legitimacy, transparency and accountability of the claimant's demand for Union dues.

12. It is averred that a close look at the claimant's letter dated 19th December, 2022, deduction forms at page 22-105 and gazette notice number 157 made with effect from 3rd July, 2018 does not make reference to the Respondent because at the time, the Respondent had not yet occupied the said farm that was then owned by Oserian Flowers Ltd.

13. The Respondent stated that the claimant wanted union dues to be deducted way back in February, 2022 when the alleged recruitment was done later in the year. Further that even if the claimant recruited the said employees, the payments could not be done because the interested party herein had also been recognized and seeking to have its dues deducted and even sued the Respondent under ELRC Cause No. E009 of 2022.

14. It is expounded that, when the Respondent was sued by the interested party, they entered into a consent on 28th December, 2022 which was adopted by the Court on 27th February, 2023. Therefore, any proceedings in this matter has an effect of reviewing the consent order entered between the Respondent and the interested party and thus should not be entertained by the Court because in allowing the same, it amount to review and or this Court siting on the issues on appeal of its own decision.

15. The Respondent maintains that the Union dues are duly remitted to the interested party herein who were first to be recognized and have an active Collective Bargaining Agreement(CBA) and are the one that represent the interest of the employees in it's firm, therefore that recognition of the Climant and remittance of further dues cannot be done.

16. While the main claim herein was pending hearing, the claimant filed an application dated 20th February, 2023, on 21st February, 2023 seeking interalia to enjoin Kenya Plantation and Agricultural Workers Union(KPAWU) and restrain the Respondent from allowing KPAWU to conduct shop-stewards elections and signing a recognition Agreement until the suit herein is heard and determined.

17. The basis upon which the Application herein is made is that on 7th February,2023, while the matter herein was pending in Court, the Respondent opened communication with KPAWU, who sought to hold a meeting and elect Shop-stewards on 24th February, 2023, which move is in violation of section 55(1) of the *Labour Relations Act*, because the said Union does not have any recognition with the Respondent.

18. He stated that the elections and meeting is a disguise to steal a match from them and have a Recognition Agreement signed, when none had been signed at the time the claimant was recruiting the Respondent's employees.

19. The Respondent responded to the Application by a replying affidavit sworn on 1st March, 2023 by Patrick Kapiloe, the Respondent's Human Resource Manager, who stated that the Interested party herein had recruited a simple majority of its employees before the claimant and the letter of 7th February, 2023 was merely to regularize its entry into the Respondent's farm. Further that election of shop steward is not pegged on Recognition Agreements.

20. He stated that its employees who have been listed in the claimant's forms have denied agreeing to joining the claimant's Union. Therefore, that the Application should be declined.

21. On 12th April, 2023, the KPAWU was joined as the interested party and matter referred for conciliation. The conciliator summoned the parties, heard them on two main issues raised being; refusal by the Respondent to deduct Union dues and refusal to sign a Recognition Agreement and wrote a report to this Court dated 19th June, 2023 which in summary states that a conciliatory meeting was conducted on 24th May, 2023 where the issues were deliberated upon and parties directed to avail their written proposals where the claimant made submissions but the Respondent did not make any.

22. The labour officer went ahead and analysed the documents on record and stated that the claimant had recruited a simple majority of the Respondent's employees and thus due for recognition that will eventually lead to signing of Collective Bargaining Agreement. He commented on the Respondent's representative and stated that they were unwilling to discuss the issues raised. He concluded by stating that the Respondent should recognize the Union to pave way for Collective Bargaining Agreement negotiation and basically that the employees should be allowed to join the Union of their choice in line with Convention 87 of the ILO Conventions and proceed to deduct Union dues and remit the same to the Union.

Interested party's case

23. Upon coming on board, the interested party filed a response to claim by a replying affidavit sworn on 24th July, 2023 by Thomas Kipkemboi, the Interested Party's Deputy General Secretary, who stated that the interested party and the Respondent, pursuant to ELRC Cause No. E009 of 2022, entered into a consent of 28th December, 2022 which was adopted by this Court on 22nd February, 2023.

24. That the terms of the said consent were inter alia for the Respondent to deduct and remit the Union dues from the employee that have signed to join the interested party Union, both parties to sign a recognition agreement and negotiate Collective Bargaining Agreement.

25. He stated that the interested party begun recruitment in late 2021 and continued until 4th February, 2022 when it achieved the simple majority and thus initiated the process of recognition and subsequently negotiated a collective Bargaining Agreement in various meetings that eventually led to the signing of a CBA dated 15th June, 2023 which is pending registration before this Court. Therefore, that since the recognition agreement is in force and having not been revoked, the Respondent has been remitting union dues to them religiously.

26. In conclusion, the affiant stated that the suit herein is unsustainable and prayed for the same to be dismissed with costs.

27. By an Application dated 27th June, 2023, the Claimant sought among other prayers for conservatory Order staying the Recognition Agreement and the CBA from being submitted to the ministry of Labour and Social Protection for assessment and filling in this Court and further stay the implementation of the said CBA pending the hearing and determination of the suit herein.

28. The claimant stated that if indeed the respondent and the interested parties have signed a Recognition Agreement and a Collective Bargaining Agreement, then the same was done in defiance of the Court Orders issued on 23rd February, 2023, that ordered for maintenance of status quo and forestalling the meeting scheduled for 24th February, 2023.

29. He stated that the actions of the Respondent and the interested party are aimed at defeating the substratum of the claimant's case and send this Court together with the claimant on a wild goose chase.

30. He maintained that there was no Recognition Agreement entered between the Respondent and the Interested parties or any CBA signed at the time of filling this suit, thus the action undertaken after filling the suit herein is in breach of the Orders issued by this Court.

31. In addition to the Application herein above, during August Court Recess, the Claimant filed a Miscellaneous Application number 161 of 2023 in Nairobi, dated 2nd August, 2023, seeking conservatory Order restraining the Respondent and the interested party from registration of CBA signed on 15th June, 2015 until the suit herein in Nakuru being ELRC Cause No. E006 of 2023, is heard and fully determined.

32. The Court, Justice Matthew Nderi Nduma, on 24th August, 2023 ordered for maintenance of status Quo and transferred the file to this Court for hearing and determination.

33. On 19th October, 2023, the Respondent raised a preliminary Objection dated 13th October, 2023 in reply to the Application dated 2nd August, 2023 in Miscellaneous Application number 161 of 2023, based on the following grounds; -

    1. That the Notice of Motion Application dated 2nd August, 2023 , the application (herein referred to as "the application") is mala fide, is misconceived, incompetent, vexatious, frivolous and an abuse of the process of the Honourable Court, brought in bad faith and bad in law as the Applicant is aware that the Application is filed before this Honourable Court without a Statement of Claim contrary to Rule 4(1) of the Employment and Labour Relations Court Rule and the issue of staying the registration of the Collective Bargaining Agreement can only be canvassed by way of a proper claim being filed but not by way of a notice of motion. In this regard, I am duly advised that the substratum of the Applicant's application does not exist. Further, the Application introduces a separate cause of action by inclusion of the 3"? Respondent into the matter therefore the Applicant has no cause of action against the 1st Respondent.

    2. That an application cannot be consolidated with another Miscellaneous application arising out of the same cause of action which issues amount to constructive res judicata.

    3. That the application is merely intended to frustrate the 1st Respondent therefore is of no legal consequences or at all the Applicant is aware that the application filed before this Court canvasses issue raised in similar matter in Nakuru ELRC Cause No. E006 of 2023, which is still pending for determination.

    4. Therefore, for the aforementioned reasons, the application of the Applicant in respect to the dispute should be struck out with costs to the 1st Respondent.

34. In response, the Claimant filed grounds of opposition dated 20th December, 2023 on the following grounds; -

    1. That the Preliminary Objection dated 13th October, 2023 is a contravention of the consolidation Order issued by this Court on 25th October, 2023 in respect of Miscellaneous Application No 161 of 2023 and Cause No E006 OF 2023.

    2. That, the preliminary objection does not meet the threshold for a preliminary objection as held in Mukisa Biscuit Manufacturing Co. Ltd -vWest End distributors (1969) EA696.

    3. That, the preliminary objection offends the provisions of Order 1 Rule 9 of the Civil Procedure Rules.

    4. That the preliminary objection offends the provisions of Rule 23 of the Employment and Labour Relations Court (procedure) Rules 2016, in so far as it seeks to stop judicial discretion to consolidate matters for expeditious determination.

    5. That the 1st Respondent shall not be prejudiced in any manner by canvassing its position on the Notice of Motion dated 2nd August 2023 within the consolidated file as the respondent has heavily relied on the impugned collective Bargaining Agreement subject of miscellaneous application No. 161 of 2023.

6. That a preliminary objection cannot be filed against a miscellaneous Application as there is no separate Claim to the miscellaneous Application as pleaded by the 1st Respondent.

35. The suit herein and all the Applications were canvassed by written submissions.

Claimant's Submissions.

36. The claimant submitted from the onset that the Respondent at the time of filling this suit, had not indicated to this Court or produced copies thereof of any recognition Agreement between it and the Interested party, He argued that it's until this Court directed the parties for conciliation that the Respondent alleged to have signed a recognition agreement with the interested party dated 6th February, 2023. Even then, that the Respondent has not informed this Court that the interested party had recruited a simple majority.

37. It was argued that on its part, the claimant had recruited 2507 of 3200 members of the Respondent's unionisable employees in the month of December, 2022 and Submitted the first 84 check off forms with 2507 members through the email addresses;eva.okallo@vegpro-group.com and Arthur.mwangi@vegpro-group.com belonging to Eva Okello and Arthur Mwangi the HR director and group accountant respectively, requesting for the Respondent to deduct union dues, but that the Respondent decline the same without giving any reason. Undeterred, on 9th January, 2023, the claimant having recruited more than a simple majority of the Respondent's employees, forwarded a copy of the Recognition Agreement for the Respondent's execution which was also in vain.

38. It was submitted that the action by the Respondent in refusing to deduct union dues and sign the recognition agreement was in violation of Sections 4,5, 48 and 54 of the *Labour Relations Act* as read with section 17(11) and 19(1)(f) &(g) of the *Employment Act* and Article 36 and 41 of *the Constitution*. In this he relied on the case of Kenya Building Construction, Timber and Furniture Industries Employees Union V Kings Development Ltd (Cause No. 1160 of 2017) where Maureen Onyango J held that; -

> " Union dues are in the nature of deductions under Section 19(1) (f) and (g) and the employee is free to require the employer to make deductions from his wages to remit as provided in the said Section. Further, Section 48 of the *Labour Relations Act* gives power to the Minister of Labour to gazette union dues and employers are under obligation to set up a check off system for deduction and remittance of such union dues from the wages of employees who have signed the check off form which in the Act is referred to as Form S in the Third Schedule of the Act, provided the same has been signed by the employee."

39. It was submitted further the claimant was not obligated in law to notify the Respondent how it was undertaking recruitment of its members outside the Respondent's working Hours. Only that the Respondent was to be notified when sending check off forms of the employees who had been recruited in order for them to deduct union dues.

40. The claimant submitted also that the argument that they ought to give the evidence of all the unionisable employee is misplaced for the reason that they are not in a position to place before Court the Respondent's Human Resource register. He argued that the Respondent, being the custodian of all employees' records is better placed to produce before Court such records. In support of this view,

the claimant relied on the case of Civicon Limited v Amalgamated Union of Kenya Metal Workers [2016] eKLR where the Court held that;-

> " The determination of the question of existence of unionisable employees is therefore one of evidence. As more employees are engaged by an employer, some leave employment while others, through natural attrition cease being employees. For this reason and for purposes of recognition, the number of unionisable employees is not expected to remain constant. Because of this the process requires full cooperation, honest disclosure and utmost good faith especially on the part of the employer to state a true and accurate reflection of the details and particulars of its work force, specifying those who are unionisable and those who are not. No difficulty is posed by any change that increases the number of unionisable employees."

41. It was argued further that the Respondent has not countered the argument by the claimant by providing the number of unionisable employee vis a vis the recruited members as per the HR records. He added that the argument that the signatures of the employees in the check off form is not that of their employees is not justified as none of the employee who allegedly disputed membership has signed any affidavit in support of such alelgations. In any case that the Respondent's role was merely to effect union deductions. In this they relied on the case of Bakery Confectionery Food Manufacturing Allied Worker Union (K) v Beta Bakers Co. Limited [2017] eKLR where Justice Nderi Nduma held that; -

> " The action by the respondent amounts to intimidation of union members and the same is unlawful. The respondent has no role whatsoever in preparation and submission of check-off forms. All it has to do is to implement collection of union dues and remit the same to the designated accounts. The respondent's proper role, therefore is to ascertain that the recruited employees represent 50+1% of its unionsable employees and if the threshold has been achieved, proceed to engage the union to discussions that would culminate in the preparation and signing of Recognition Agreement. The respondent had no business to engage its employees in questioning the authenticity of their signatures and membership unless any of the individual employees voluntarily wrote protesting his or her membership of the union which is not the case here."

42. The claimant submitted that they were the first in time to recruit the members of the Respondent because at the time of recruitment on 19th and 20th December, 2022, the Interested party had not recruited the Respondent's employee or signed any Recognition Agreement as such the allegations by the Respondent that they could not deduct union dues having signed a recognition agreement with the interested party is not true because the purported Recognition Agreement was signed on 6th February, 2023, when the claimant had already submitted its recognition agreement on 10th January, 2023 about a month prior.

43. On the averment by One, Alias Walekwa, a shop steward, the claimant submitted that the said employee is not one of its recruited members and no information has been tender before this Court on his position in the Union. Moreover, that the election of shop stewards was stopped by this Court, thus none was elected and cannot therefore swear any affidavit on behalf of the other employees. Therefore, that this Court should ignore his affidavit.

44. Contrary to the argument by the Respondent, the claimant submitted that the Respondent was made aware of the Minister Legal Notice number 157 made on 3rd July, 2018. This was captured in the reverse side of each of the 84 check off forms that were submitted to the Respondent. Furthermore, that the Respondent admitted in paragraph 12 of its response to knowledge of the existence of the said notice.

45. The claimant submitted that ELRC Cause No. E009 of 2022 by the interested party was on failure to deduct and remit Union dues and unlawful and victimization of employees on account of Unionization only. He argued that the issue of recognition was not one of the issues raised in that suit, neither was it part of the consent entered into on the 28th December, 2023. It is reiterated that the issue of recognition was not pleaded anywhere in the interested party Memorandum of claim dated 4th April, 2022 in Cause E009 of 2022. On that basis it was argued that any argument that alleged to provide for automatic signing of Recognition through the Cause E009 of 2022 is grossly unlawful and should be disregarded by this Court.

46. The claimant submitted further that though the consent dated 28th December, 2022 at paragraph (iii) provide for Recognition of the interested party the same was adopted by the Court on 27th February, 2023 as such no Recognition agreement could have been signed before the adoption of the consent by this Court. So that the attached Recognition Agreement by the Respondent and the Interested party signed on 6th February, 2023 before adoption of the Consent cannot stand. Furthermore, that the consent was on a proviso that the interested party recruits a simple majority, which evidence has not been tendered before this Court to confirm the Interested party recruited the said simple majority as at 6th February, 2023 when they signed the Recognition Agreement.

47. The claimant submitted that as at the February, 2023, the claimant had recruited 2507 employees out of labour force of 3200 unionisable employees, therefore that it is not possible for the interested party to have recruited a simple majority when the remaining employees were less than a thousand.

48. The claimant maintained that signing of recognition agreement cannot be done on barely mutual understanding between parties but must be in compliance with Section 54(1)&(2) of the *Labour Relations Act*. To support this argument, the claimant relied on the case of Cello Thermoware Limited V Kenya Union of Commercial Food and Allied Workers (Civil Appeal No. 120 of 2019) where the Court held that;-

> " We have considered the record, the parties' submissions, and the law and are of the view that the issues for determination are; a.Whether or not the learned judge rightly found that the parties agreed to sign a Recognition Agreement; andb.Whether the learned judge rightly concluded that the respondent had attained the threshold requirements specified by section 54 (1) of the *Labour Relations Act*, and so, was entitled to be recognised by the appellant.The appellant's complaint is that the learned judge relied on the Conciliator's letter of 24th April 2017 to reach a finding that the parties had agreed to sign a Recognition Agreement. The impugned letter reads in pertinent part;
>
> > "On the second issue, the matter was discussed and it was mutually agreed as per the recommendation of the conciliator that parties sign the recognition agreement as the union had recruited the required number of employees pursuant to section 54 (1) (2) of the *Labour Relations Act* 2007 and that that said agreement be presented to the conciliator on 29th March 2017, but it is unfortunate that I have not received any communication from you.".
>
> It is clear from the above that though an intention to sign an agreement may have been expressed, no such agreement was ever signed. It is also evident that there was nothing in the letter that expressed that a simple majority of the appellant's unionisable employees had been met. This notwithstanding the learned judge stated thus;"...The Conciliator indicates in his letter of 24th April 2017 that the Parties agreed to execute the Recognition Agreement."

> The court further stated;- "...Resistance to recognition based on these numbers, and the procedural issues raised by the respondent fade, in light of the agreement between the parties on the core substantive issue in dispute...".In other words, the court was satisfied that the parties having agreed to sign an agreement meant that the simple majority requirement had been achieved. In our view, though the parties may have agreed to sign a recognition agreement, and no such agreement came in existence, would infer that the matter remained unresolved which is why it was referred to court. Without such agreement, and with nothing in the Conciliator's letter demonstrating that a simple majority was achieved, we find that no basis at all was established upon which the learned judge could conclude that a simple majority was met or to warrant the signing of a recognition agreement, and we so find."

49. On that basis, it was submitted that since section 54 of the *Labour Relations Act* was not complied with, the signed Recognition Agreement and the resultant Collective Bargaining Agreement have no basis in law and should be disregarded by this Court.

50. On the Preliminary Objection raised by the Respondent, the claimant submitted that the same does not meet the principles for a preliminary objection as held by the supreme Court in the case of Agnes Wachu Wamae& 97 Others Vs Barclays Bank of Kenya Limited. The reasons being that the Miscellaneous Application dated 2nd August, 2023 was meant to only stop the illegal processing of the CBA between the interested party and the Respondent. He also submitted that the Preliminary Objection does not raise clear points of law that can be argued without ascertaining the facts of the preliminary objection. Further that since the Application was consolidated with this suit, the entire suit cannot be severed from the consolidated file.

51. The claimant reiterated that they have recruited 2507 employees out of 3200 unionisable employees, as such they ought to have been recognized and union dues deducted and remitted to the Union. That, Failure to deduct the Union dues should be visited against the Respondent and direct to pay the union dues from their own funds as was held in the case of Banking Insurance & Finance Union(Kenya) V Maisha Bora Sacco Limited (Cause No. 1776 of 2014).

52. The claimant submitted that the respondent and the interested party have illegally signed a recognition Agreement and CBA without recruiting a simple majority and following the procedure under section 54 of the *Labour Relations Act*, therefore that the said documents have no backing in the law and the said agreements should be disregarded. Conversely, that the claimant has submitted 84 check off forms that has 2507 recruited employees out of a work force of about 3200 unionisable employees, therefore that it is the proper Union that ought to be recognized and union dues deducted and remitted to it.

53. He urged this Court in conclusion, to find in its favour and allow the claim as prayed.

Respondent's Submissions

54. The Respondent submitted on four issues; whether there is a valid Preliminary Objection, Whether the claimant/ Applicant has meet the legal threshold for the Respondent to deduct Union dues under section 48 of the *Labour Relations Act*, whether the Claimant/ Applicant is entitled to the reliefs sought and who should bear costs.

55. On the Preliminary Objection, the Respondent submitted that the Application of 2nd August, 2023 offends Rule 4(1) of the Employment and Labour Relations Court Procedure) Rules, 2016. Further that the Application of 2nd August, 2023 as filed amounts to constructive res judicata. Also that the law does not envisioned consolidation of an Application with a miscellaneous Application. to support this,

the respondent cited the case of Law Society of Kenya Vs Centre for Human Rights and Democracy & 12 Others[2014] eklr where the Court in respect to consolidation stated that;-

> " the essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed."

56. The principles of consolidation were laid out in the case of Joseph Okoyo Vs Edwin Dickson Wasunna [2014] eklr which cited the case of Nyati Security Guards & Services Ltd vs - Municipal Council of Mombasa [2004] eKLR as follows:

> " The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-
>
> 1. Some common question of law or fact arises in both or all of them; or
> 2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
> 3. For some other reason it is desirable to make an order for consolidating them."

57. The Respondent discredited the claimant and argued that the claimant is a vexatious litigant who has filed several applications that lack foundation before the law. Further that the claimant conduct piecemeal litigations which are abhorred in law and amount to constructive res judicata as stated in the case of Kenya Commercial Bank Limited V Benjoh Amalgamated Limited[2017] eklr where the court held that;-

> " state of UP v Nawab Hussain, AIR 1977 SC 1680, considered the doctrine of constructive res judicata and delivered itself thus,"This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon."

Further that,

> But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could; have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same

principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle."

To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits."

58. Accordingly, that the Miscellaneous Application filed by the claimant in Nairobi stopping the registration of the CBA, ought to have been done through a proper suit in line with Rule 4(1) of the Employment and Labour Relations Court (Procedure) Rules and not by a notice of motion as was done. Therefore that having been filed by a notice of motion, the Application did not have any legs to stand on as is required under the law and reiterated by the Court in the case of Chege Thiari & Another V Eddah Wanjiru Wangari & 3 Others[2018] eklr where the court held that;-

> " in the end, I find the application is not properly before this court as there is no suit upon which the Notice of Motion can stand. The Court cannot invoke its inherent jurisdiction to cure that defect. There is no suit to amend and consolidate with Pet.1/2018. For that reason, Is trike out the Notice of Motion dated 16/7/2018 with costs to the 1st and 2nd Respondents."

59. Similarly, that the application of 2nd August, 2023 is defective and the same cannot be consolidated with cause E006 of 2023. Thus, he argued that the Preliminary Objection is justified and prayed for the same to be upheld and urged this Court to strike out the Claimant Application of 2nd August, 2023.

60. On the substance of the claim, the Respondent began by submitting on whether the claimant has meet the threshold for deduction of Union dues and argued that the basis for deduction of Union dues is at Section 48 of the *Labour Relations Act*, that require firstly that the Union must get a ministerial order authorizing it to request an employer to deduct Union dues, which the Respondent has not been served with. He argued that such omissions went to the root of the Respondent's power to deduct and remit Union dues, as it affected the legitimacy, transparency and accountability of the claimant's demand for union dues. He added that Gazette Notice number 157 referred to by the claimant did not make any reference to it because at the time, the farm was owned by Oserian farm. Therefore, that the Gazette Notice is not binding on them.

61. Secondly, that the union is required to serve notice in form S as stipulated under Third schedule of the Act, which should be signed by the employees in respect of whom the employer is required to make the deductions. This was reiterated by the Court in Banking Insurance Finance Union(K) Vs Kenya Revenue Authority [2018] eklr. On that note the Respondent denied receipt of any check off forms from the claimant Union and stated that they were unable to deduct and remit union dues.

62. The Respondent submitted that the interested party is the one that had submitted its check off forms in February, 2022, almost a year before the claimant carried out the purported recruitment of union

members. In any event that the claimant has not tendered any evidence of the said recruitment and or service of the check off forms before this court in line with section 107 of the *Evidence Act*. Also that the allegations the the Respondent ought to have counterchecked the recruited members in the registered is highly misguided.

63. Based on the foregoing, the Respondent submitted that the claimant has not met the threshold for the deductions of Union dues by the Respondent. To support this, they relied on the case of Kenya Union of Commercial, Food and Allied Workers V Nairobi Sports House Limited [2018] eklr where the Court held that; -

> "However as provided in Section 48 of the *Labour Relations Act* and confirmed in the decision of the court in the case of Kenya Union of Hair and Beauty Salon Workers -vs- Style Industries Limited and Another referred to above an employer can only deduct check off forms from employees who have signed the check-off forms once the same have been served upon the employer. Section 48 (3) of *Labour Relations Act* provides as follows –"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." Having not served the respondent with check-off forms in the manner provided in Section 48(3), the respondent has no basis for deduction of union dues. It follows that the employer could not have deducted union dues from any of the 117 employees referred to by the claimant from 31st July 2011 and therefore the employer does not have the money to remit to the union. The logical conclusion is therefore that the claim fails in toto and is dismissed. The court hastens to add that the union is not barred from recruiting or submitting fresh check-off forms to the respondent in the manner provided for in the Act and that the respondent would be under statutory obligation to comply should that be done."

64. The Respondent submitted that that unlike the claimant that has not proved recruiting a simple majority, the interested party on the other hand has recruited and obtained 50+1 of unionisable employees and a consent was recorded between it and the Interested party which was adopted by this Court and therefore cannot be defeated in these proceedings because it will amount to review of the said orders or Appeal by this Court sitting on appeal of its own decision.

65. On whether the claimant is entitled to the relief sought, it was submitted that the suit and the Applications filed herein by the Applicant are vexatious, frivolous, incompetent, fatally defective and blatant abuse of Court process, therefore is not tenable and the same is merely intended to frustrate the Respondent and with no legal consequences. He urged this Court to dismiss the suit and the Applications for lacking merit.

66. On cost, the Respondent submitted that costs follow event as provided for under section 27 of the *Civil Procedure Act* as read with Rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016. He thus prayed for costs to be granted to them.

67. I have examined all evidence and submissions of the parties herein. The issues for this court's consideration are as follows:-

(1) Whether the Claimant recruited a simple majority of the Respondent's employees.

(2) Whether the failure of the Minister to issue an order of deduction of union dues in favour of the Claimant.

(3) Whether the Interested Party has signed a recognition agreement with the Respondent.

68. On issue No. 1, the Claimant averred that they have recruited a simple majority of the Respondent's employees as set out in the check off forms to the Respondent which the Respondent failed to effect.

69. They exhibited various forms at page 22 to 106. All these forms were directed to the Respondents herein but unfortunately lack dates and therefore it is not viable to state when these recruitment was done save for some dated 2/12/2022 and a few with a date December 2022.

70. That not withstanding the Respondents averred that the recruited employees reneged on this fact which made it impossible to effect the deduction by the Respondents.

71. The Respondents however failed to exhibit any evidence that the union members recruited by the Claimant reneged on this issue of being members of the Claimant union.

72. The Respondents have also submitted that the Claimant failed to get an order from the Minister allowing them to have union due deductions made by the Respondent to their benefit.

73. Section 48 (2) of the *Labour Relations Act* 2007 however state as follows:

(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.

74. My reading of this section show that the provision is not couched in mandatory terms and so the insistence that the Minister must issue the order is not backed by the law.

75. Having established that the Claimant indeed made some indicated recruitments and having established that the deduction need not be sanctioned by the Minister and that there is no evidence that the unionsable employees withdrew their membership from the Claimant union, I find that indeed there was a recruitment done.

76. The Claimant however had a duty to show the number of recruited employees vis a vis the entire work manship. In an attempt to resolve this matter the Labour Office wrote a report dated 19th June 2023 which show that the Claimant had recruited a simple majority of the unionsable employees, this having been established on 24/5/2023 during a conciliation meeting.

77. The Respondents have averred that they entered a contract with the Interested Party way back on 28th December 2022 to sign a recognition agreement and withdrew case no 0009/22.

78. The Respondents further signed a recognition agreement with Interested Party on 15th June 2023.

79. My understanding of these facts shows that whereas the Claimant had made some recruitments of union members, the same was overtaken by events when the Interested party went behind them and signed a recognition agreement with the Respondents indicating simple majority by the Interested Party.

80. To reverse these gains, the matter can only be handled by the National Labour Board as provided under Section 54 (5) of the *Labour Relations Act* which provides as follows:-

Section 54 (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

81. From my finding above, I find that the Interested Party and the Respondent having signed a recognition agreement; I don't have jurisdiction to revoke it and the issues herein have been overtaken by events. The claim cannot therefore stand. The claim is therefore dismissed with no order of costs.

JUDGMENT DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Oduo holding brief Achiando for Respondent – Present

Omwaka holding brief Saya for Interested Party - Present

N/A for Claimant

Court Assistant - Leah

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