



**Chongqing International Construction Limited v Kenya Union
of Road Contractors & Civil Engineering Workers (Cause
E774 of 2021) [2024] KEELRC 891 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 891 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E774 OF 2021
MA ONYANGO, J
APRIL 18, 2024**

**BETWEEN
CHONGQING INTERNATIONAL CONSTRUCTION LIMITED CLAIMANT
AND
KENYA UNION OF ROAD CONTRACTORS & CIVIL ENGINEERING
WORKERS RESPONDENT**

JUDGMENT

1. The Claimant is a limited liability company incorporated in the People’s Republic of China and licensed to do business in the Republic of Kenya in accordance with the provisions of the [Companies Act](#) No. 17 of 2015.
2. The Respondent is a trade union registered under the [Labour Relations Act](#) and represents the Unionisable employees working for the Claimant.
3. The suit herein was instituted vide a Memorandum of Claim dated 20th September 2021 in which the Claimant seeks the following orders:
 - i. A declaration that the Strike called by the Respondent in its notice of 6th September 2021 is unlawful and therefore unprotected.
 - ii. A permanent injunction do issue restraining the Respondent by themselves, their officials, agents and/or members from making demands on the Claimant until the parties sign a Recognition Agreement.
 - iii. Costs of the suit
 - iv. Any other relief that this honorable court may deem fit and just to grant.



4. Contemporaneously with the Memorandum of Claim, the Claimant filed a Notice of Motion in which it sought orders that the court declare the strike unlawful and therefore unprotected and that the court issue an order restraining the Respondent and its members from calling, taking part in, instigating or inciting others to take part in the strike.
5. Upon considering the Claimant's application ex parte the court granted orders restraining the Respondent from taking part in, calling, instigating or inciting the employees of the Claimant or any other person to take part in the industrial action pending inter partes hearing of the application.
6. The Claimant avers that it is a contractor of record in a World Bank-financed road upgrading project in Turkana County that is supervised by the Kenya National Highways Authority (KENHA).
7. That pursuant to an extension previously applied for and approved, the project had a hard deadline and completion date of 30th October 2021.
8. The Claimant states that in blatant breach of the law, the Respondent's Union instigated, incited and called for a strike of its members which strike commenced on 17th September 2021.
9. The Claimant further states that on or about December 2020, it was approached by the Respondent for purposes of recognition of the union. That the Claimant granted access to the union in its site to enable it educate and enroll workers who were willing to join the membership of the Union.
10. The Claimant avers that pursuant to a meeting between the parties which took place on 18th March 2021, it was agreed that the Respondent would present Check-off forms to the Claimant in order to kick-start the process of formally recognizing the union.
11. According to the Claimant, in May 2021 and on the strength of an estimated one hundred and twenty-eight (128) names in check-off forms, the Respondent demanded that the Claimant starts deducting dues and submitting them to the Respondent.
12. The Claimant avers that it took the position that the Respondent did not have a majority of the workers enrolled at the time and that it would be premature to start deducting dues and negotiating on the workers terms but the Respondent threatened the Claimant with Industrial action if it did not comply with the deductions.
13. It is the Claimant's contention that in light of the Respondent's coercive actions and in a bid to maintain cordial industrial relations, it started deducting union dues for the enrolled 128 workers and remitting the same to the Respondent.
14. According to the Claimant, in addition to collecting union dues for its members who formed less than a majority of the Claimant's workers, the Respondent started agitating for the workers' rights without following due process and in the absence of a Recognition Agreement.
15. The Claimant states that on 6th September 2021, the Claimant was served with a Strike Notice by the Respondent. That vide a letter dated 8th September 2021, the Chief Industrial Relations Officer of the Ministry of Labour wrote to the parties and appointed a Conciliator to reconcile the parties on the issues that had led to the issuance of the Strike Notice. That the parties met on 14th September 2021 at the Conciliator's office, presented their respective cases and the Conciliator reserved her decision to a later date.
16. It is the Claimant's case that in violation of the law, the Respondent issued a further Notice to its members dated 15th September 2021 informing them that the Strike was still on and assigned 17th September 2021 as the date of the strike based on the earlier strike notice.



17. It is averred that the workers downed their tools on 17th September 2021. That they showed up at the gate of the Claimant's yard at Kakuma and started hurling stones and objects while chanting songs to the effect that they were on strike.
18. The Respondent replied to both the Claim and application vide a Replying Affidavit dated 27th September 2021.
19. On 12th October 2021 the court referred the matter to the Labour Commissioner for conciliation and pursuant to the said court orders, the Conciliator, G.I Tsimuli filed a report dated 8th February 2022.
20. Parties were thereafter on 10th May 2022 directed to file submissions on the conciliation report and any other issues in the claim. The Claimant's submissions are dated 31st May 2022. The Respondent's submissions are dated 15th June 2022.

The Claimant's Submissions

21. In its submissions, the Claimant identified the issues for determination to be:
 - i. Is the Respondent's strike deserving of this court's protection;
 - ii. Are the Respondent's alleged grievances that prompted the strike merited;
 - iii. Is the Respondent on the right side of the law by engaging in collective Bargaining in the absence of a Recognition Agreement with the Claimant;
22. On the first issue, the Claimant referred the court to section 78(1)(e) of the *Labour Relations Act* and submitted that the intent behind this provision was to nurture the relationship between the Employer and the Employee by fostering an environment where the employment relationship and the Employee's availability to work was not interfered with during the conciliation process.
23. It is the Claimant's submission that since conciliation had been initiated, the Respondent should have let the conciliation process come to a conclusion before calling on strike as envisaged by section 69 of the *Labour Relations Act*.
24. The Claimant submits that the conciliator did not issue a certificate that the dispute had been unresolved by the conciliator and thirty (30) days had not lapsed from the date of the conciliator's appointment.
25. With respect to the second issue the Claimant submits that the Respondent's alleged grievances that prompted it to call an unlawful strike are not merited.
26. The Claimant submitted that the Respondent cannot be allowed to flout the law in the name of seeking immediate and imagined justice for its members as labour relations are an exercise in negotiations and the issuance of a strike notice by a Union in the absence of due process is an illegality that should be reprimanded in the harshest terms possible.
27. On the last issue it was the Claimant's submission that the Respondent has never sought formal recognition and that the same should not be granted through the back-door. It is also submitted that the issues tabled before the conciliator were matters of an employment nature as between the Claimant and its employees and that the Respondent did not raise matters Agreement or Collective Bargaining Agreement.



28. The Claimant urged the court to declare the strike unlawful and unprotected and that the Respondent be compelled to present the Claimant with a Recognition Agreement for its further action. The Claimant also sought for costs of claim.

The Respondent's Submissions

29. The Respondent in its submissions framed the issues for determination to be:
- a. Are the Claimant employees entitled to payment of statutory minimum as per the Sectorial Order?
 - b. Can the Respondent receive Union dues where there is no Recognition Agreement?
 - c. Do employees of the Claimant have a right to go on strike
 - d. Can the Respondent be recognized once they have recruited employees of the Claimant?
30. On the first issue, it is the Respondent's case that Article 41 of the *Constitution* as well as section 48(1) of the *Labour Institutions Act* make provision on the Statutory minimum rate of pay. According to the Respondent, section 3(3) of the *Labour Institutions Act* (Building and Construction Order) Legal Notice No. 20 of 2013 provides that an employee shall not be paid housing allowance of less than 20% of the employee's rate of wages. The Respondent avers that section 3(3) above, is applicable in the sector in the whole country.
31. On the second issue, the Respondent submitted that 317 employees of the Claimant have acknowledged membership. It is submitted that the total workforce as indicated at page 12 of the Claimant's memorandum of claim is 383.
32. According to the Respondent, the Claimant has not disputed that the Respondent served it with check off forms bearing the names of 317 employees. That the Claimant decided to deduct union dues from 128 employees only which action according to the Respondent was aimed at frustrating the issue of recognition.
33. The Respondent submits that it had recruited 82.7% meeting the threshold for recognition. The Respondent further submitted that section 54 of the *Labour Relations Act* provides the threshold for recognition of a trade union being recruitment of a simple majority. It is submitted that attainment of a simple majority for purposes of recognition is a matter of evidence for and the Respondent has the documentary evidence. In support of this position, the Respondent relied on the decision in *Tailors and Textiles Workers Union v Global Apparels EPZ Limited, Fidelis Omwamba Onsongo and 6 others* (2019) eKLR.
34. The Respondent submitted that union dues deduction is not pegged on Recognition Agreement.
35. On the third issue, the Respondent submitted that the Claimant's employees were entitled to go on strike as stipulated by Article 41(d) of the *Constitution*.
36. The Respondent avers that pursuant to section 76 of the *Labour Relations Act* 2007, the Respondent issued a strike notice which strike was as a result of the Claimant's failure to pay its workers the Saturday work which the Claimant was paying for at half a day's rate.
37. In conclusion, the Respondent urged the court to order the Claimant to pay its employees 20% housing allowance; that the court determines and interprets the intention of the Order; the court directs the Claimant to pay all unremitted union dues from July 2021 from its own account, and issue an



order directing the Claimant to immediately sign the recognition agreement and embark on CBA negotiation. The Respondent also sought for costs.

Analysis and Determination

38. Having considered the pleadings and the rival submissions of the parties herein, this court is of the considered view that the issues falling for determination are:
- i. Whether the Respondent had the right to call a strike;
 - ii. Whether the strike called by the Respondent was protected;
 - iii. Whether the Claimant is entitled to the reliefs sought.
39. On the first issue for determination the Claimant submitted that the Respondent had no capacity to call a strike or to raise the issues that led to the calling of a strike as it does not have a recognition agreement with the Claimant.
40. Recognition of trade unions is provided for in section 54 of the *Labour Relations Act* which provides:
Recognition of trade union by employer.
- 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.
- (2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.
 - (3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a The *Labour Relations Act*, 2007 49 trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.
 - (4) The Minister may, after consultation with the Board, publish a model recognition agreement.
 - (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
 - (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. (8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.
41. Membership of trade unions is on the other hand provided for in section 48 of the Act as follows:
Deduction of trade union dues.

48.



- (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 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.
- (3) 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.
- (4) The Minister 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.

42. It is evident from sections 48 and 54 of the Act that recruitment of members must precede recognition as a trade union must recruit a simple majority before being entitled to recognition. It is further evident that a member is entitled to representation by the union even where the union does not have a recognition agreement.

43. It is therefore not correct that a union that does not have a recognition agreement cannot agitate for the rights of its members. A trade union with members has a right to represent its members even if it has not been recognized by the employer. For these reasons the Respondent had a right to call a strike in furtherance of the rights of its members.

44. On the second issue for determination, the law relating to strikes is found in Article 41 of the *Constitution* and Part X of the *Labour Relations Act*. Article 41 provides:

45. Article 41 of the *Constitution* provides:

41.



- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.

46. Section 76 of the *Labour Relations Act* provides for protected strikes and lock-outs as follows:

A person may participate in a strike or lock-out if—

- (a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;
- (b) the trade dispute is unresolved after conciliation—
 - (i) under this Act; or
 - (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and
- (c) seven days written notice of the strike or lock-out has been given to the other parties and to the Cabinet Secretary by the authorised representative of—
 - (i) the trade union, in the case of a strike;
 - (ii) the employer, group of employers' organisation, in the case of a lock-out.

47. Section 78 provides for prohibited strikes or lock-outs as follows:

- (1) No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if—
 - (a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;
 - (c) the parties have agreed to refer the trade dispute to the Employment and Labour Relations Court or to arbitration;
 - (d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the Employment and Labour Relations Court;
 - (e) the trade dispute was not referred for conciliation in terms of—
 - (i) this Act; or



- (ii) a collective agreement providing for conciliation;
 - (f) the employer and employees are engaged in an essential service;
 - (g) the strike or lock-out is not in furtherance of a trade dispute; or
 - (h) the strike or lock-out constitutes a sympathetic strike or lock-out.
 - (2) For the purposes of this section—
 - (a) an employee engages in a sympathetic strike if the employee participates in a strike in support of a trade dispute in respect of which the employee’s employer—
 - (i) is not a party to the dispute; or
 - (ii) is not represented by an employer’s organisation that is a party to that dispute; or
 - (b) an employer engages in a sympathetic lock-out if the employer locks out an employee in support of a trade dispute—
 - (i) to which the employer is not a party; or
 - (ii) in respect of which the employer is not represented by an employer’s organisation that is a party to dispute.
48. The Claimant has averred that the strike action called by the Respondent was unprotected on the basis that the Respondent called for a strike before the conciliation process was concluded.
49. The Respondent on the other hand maintains that it was justified in calling a strike after the Claimant refused to pay its workers full pay for Saturday work which they were paying at half day rate.
50. The strike notice dated 6th September 2021 was issued before the dispute was referred to conciliation while the second strike notice was issued during the pendency of the conciliation process.
51. The strike notice dated 6th September 2021 complied with the provisions of section 76 of *the Act* and was not prohibited by any of the provisions of section 78 *the Act*. The strike was therefore a protected strike.
52. The second notice was on the final issue the Claimant prayed for a permanent injunction restraining the Respondent by themselves, their officials, agents and/or members from making demands on the Claimant until the parties sign a Recognition Agreement.
53. Having found that the strike notice of 6th September, 2021 was in accordance with the law, the prayer for an injunction must fail. In any event the court stopped the strike by orders granted to the Claimant on 21st September, 2021. It has not been stated that the Respondent failed to comply or continued with the strike after the date of service of the court order. The prayer must therefore fail.
54. The second prayer is for a permanent injunction restraining the Respondent from making demands on the Claimant until the parties sign a recognition agreement. As I have already stated above, a trade union has a right to make demands on behalf of each of its members and does not need a recognition agreement to do so. This prayer is therefore incapable of being granted as it would interfere with the right of representation of the members of the Respondent which is enshrined in Article 41 of the *Constitution*. The prayer is thus unconstitutional.



Conclusion

55. In the end, I find that the Claimant has not persuaded the court that it is entitled to the prayers sought in the suit herein. The result is that the suit is without merit and is hereby dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 18TH DAY OF APRIL, 2024

MAUREEN ONYANGO

JUDGE

