



**Kenya Engineering Workers Union v Africa Metal Works Limited (Employment and Labour Relations Cause 61 of 2018) [2024] KEELRC 859 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 859 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 61 OF 2018**

**AN MWAURE, J**

**APRIL 16, 2024**

**BETWEEN**

**KENYA ENGINEERING WORKERS UNION ..... CLAIMANT**

**AND**

**AFRICA METAL WORKS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Memorandum of Claim dated 26<sup>th</sup> November 2018.

**Claimant's Case**

2. The Claimant avers that it is a duly registered trade union within the meaning of the *Labour Relations Act* to cater for all unionizable employees in the engineering industry.
3. The Claimant avers that the Respondent broke up from East Africa Works Limited after a disagreement with fellow directors, it then moved out with a portion of the work force who were already in the Claimant's membership.
4. The Claimant avers that being part of East Africa Works Limited, the Respondent was a member of the minor engineering group of the Federation of Kenya Employers who have duly signed a Recognition Agreement and CBA with the Claimant.
5. The Claimant avers that when the Respondent moved from her fellow directors and left with part of the employees, it did not stop deductions of union due, the employees did not withdraw from the union and their accrued benefits were not paid.



6. The Claimant avers that in May 2018, 16 employees of the Respondent reaffirmed their membership with the Claimant union by appending their signature to the new check off forms which were forwarded to the Respondent vide a letter dated 15.10.2018.
7. The Claimant avers that having met the requirements of the law, it also forwarded the Recognition Agreement by proposing signing of the same which the Respondent postponed the signing date via telephone call to the Claimant.
8. The Claimant avers that the Respondent did issue 8 of its members with termination notices on grounds of redundancy, however, the notices were as a result of refusal to withdraw from the Claimant union.
9. The Claimant avers that it invoked Section 62 of the Labour Relations Act by reporting a trade dispute to the Labour Ministry which is yet to be acted upon.

### **Respondent's Case**

10. In opposition to the Claim, the Respondent filed its Reply to the Memorandum of Claim dated 15<sup>th</sup> January 2019.
11. The Respondent avers that the issue in dispute has been overtaken by events at the filing of the claim as the claimants were given notices of termination of contracts on 31.10.2018 with one-month notice pay for November 2018 which was duly paid on 20.11.2018 directly to the employees accounts and they stopped working with the Respondent on 21.11.2018, upon receipt of the said payment they filed the claim on 27.11.2018.
12. The Respondent avers that it is a separate legal entity from East African Metal Works Ltd and neither the two entities are a party to the Recognition Agreement and/or CBA dated 10.08.2018.
13. The Respondent avers that it has never had any checkoff system or deduction of any union dues from its employees' salaries for remission to the Claimant and has had no dealings with the Claimant.
14. The Respondent avers that the claim is fraudulent as it purports that the Respondent continued deductions from its employees' salaries from May 2018 when the letters clearly show that letters requesting for check off deduction and signing of the Recognition Agreement are dated 15.10.2018 and 26.10.2018 at a time when some of the employees had 6 months contracts dated 01.04.2018 which expired on 30.09.2018 and others had one year contracts dated 01.04.2018 due to expire on 31.12.2018 while some whose contracts had been renewed on 01.10.2018 due to expire on 31.03.2019.
15. The Respondent avers that it could not execute a Check-off System and Recognition Agreement in respect to employees whose contracts had expired and others which were due to expire. Consequently, Section 48 of the Labour Relations Act was and is not applicable as there was no Recognition Agreement, CBA or Ministerial Order to sanction the purported request for check-off deductions and there are no such documents have been produced to this honourable court.
16. The Respondent avers that the termination notices dated 31.10.2018 were issued in accordance with each of the affected employee contracts and none of them had served a period exceeding 12 months and reasons for termination are clearly set out in the respective letters.
17. The suit was canvassed by way of written submissions.



### Claimant's Submissions

18. The Claimant submitted that a recognition agreement is not a requirement of a trade union to represent its members in court by a union of its choice as set in Section 54 (2) of the [Labour Relations Act](#) which states:-

“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.”
19. The Claimant relied on the judgment made in Kenya Shoe and Leather Workers Union and Modern Soap Factory
20. The Claimant submitted that the redundancy did not meet the requirements set under Section 40 of the [Employment Act](#).
21. The Claimant submitted that the termination of the grievants was due to a trade union affiliation as those who wrote to the Claimant union requesting for more time to sign the Recognition Agreement were not declared redundant.
22. The Claimant submitted that the memorandum of claim was filed on 27.11.2018 was filed in time as the one-month notice was issued on 31.11.2018 meaning it was to lapse on 30.12.2018.
23. The Claimant submitted that the termination was unprocedural, unfair and unlawful hence the remedy would be either compensation for equal period remaining in the contract or payment of the remaining period in the fixed term contract in line with Section 49 of the [Employment Act](#).

### Respondent's Submissions

24. It is the Respondent’s submission that the Claimant has no *locus standi* to initiate any trade dispute purporting to involve itself or any of its members against the Respondent. It is not in dispute that the Claimant union has no recognition Agreement with the Respondent and no such Agreement has been produced by the Claimant in support of their claim.
25. The Respondent submitted that the Claimant tendered letter which shows that it was soliciting and attempting to recruit members who were then employees of the Respondent. Vide a letter dated 26.10.2018, the Claimant union sought a meeting with the Respondent on 12.11.2018 with a view of discussing and signing a Recognition Agreement to commence deduction of union dues however this did not materialise as the employees had not decided whether they wanted to be members of the union.
26. The Respondent submitted that the subject employees were only engaged on temporary contracts of 6 and 12 months running from 01.04.2018 to 30.09.2018 and 01.01.2018 to 31.12.18 respectively. Some of these contracts were renewed on 01/10/2018 to 31.03.2019 while others lapsed on 31.10.2018 and all dues owed to the employees were paid on 20.11.2018 and the employees executed discharge vouchers and certificates of service dated 23.11.2018.
27. Therefore, the Claimant has no *locus standi* to initiate this suit on behalf of the Respondent’s former employees since they are not members of the claimant union at the time of employment and there was no Recognition Agreement between the Claimant union and the Respondent Employer. It relied



on *Kenya Union of Employees of Voluntary and Charitable Organizations [KUEVACO] v Board of Governors & Maina Wanjigi Secondary School* [2015] eKLR.

### **Analysis and Determination**

28. Having considered the pleadings, witness statements, submissions and the evidence on record and concluded, the issues for determination are:
  - a. Whether the Claimant union has *locus standi* to file a suit on behalf of the grievants.
  - b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant union has locus standi.**

29. In *Kenya Shoe & Workers Union v Modern Soap Factory Ltd* [2017] eKLR the Court of Appeal held as follows:

“After careful consideration of the submissions presented to the court including the decision by Mbaru J, in *Communication Workers Union v Safaricom Ltd* [2014] eKLR, I am persuaded that the claimant is a stranger to any employment relationship between the respondent and the grievants. There is no averment in the pleading to the effect that the grievants were members of the claimant union and there is no recognition agreement between the claimant and the respondent. It is therefore not clear what interest the claimants have in the employment relationship between the grievants and the respondent.

The mere fact that the claimant is registered and mandated to represent unionisable employees in the shoes and plastic sector does not, in my view entitle the claimant to an automatic *locus standi* to substitute all the unionisable employee in the sector and institute suits in her own name even on matters that appears personal and not collective.”

30. Further, in *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR the Court of Appeal held:

“A recognition agreement is defined under Section 2 of the *Labour Relations Act* as an agreement in writing made between a trade union and an employer, group of employers or employers’ organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers’ organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct.”

31. Against this background, lack of a Recognition Agreement does not limit a trade union from representing its members in court unless the said employees are not members of the trade union.
32. In respect to whether the employees were members of the Claimant trade union, the Claimant only produced a notice to employer authorizing deduction dated 2<sup>nd</sup> May 2018, there is no evidence that the Respondent ever effected any union deductions pursuant to Section 48 of the *Labour Relations Act*.
33. The respondent avers that they broke away from East Africa metal marks ltd and so is a complete legal entity from the aforesaid East Africa Metal limited. They state decisively that they have therefore not



- been members of the claimant union and neither did they have check off forms with the employees of the claimant unions. They claim they have had no dealings with the claimant.
34. On the other hand it is the claimants averment that the respondent were members of the minor engineering group of federation of Kenya employers with recognition agreement and CBA with the claimant.
  35. There is however, no such evidence of such claims and as earlier said a party who alleges a fact must prove it (section 107 of the *evidence act*).
  36. Indeed the grievants wrote to the claimant vide their letter dated 9<sup>th</sup> November 2018 and asked for time to decide if to sign agreement apparently to join the union. They claimed the decision was unanimous from all the staff members.
  37. Clearly, the claimant had not yet had any recognition agreement with the respondents.
  38. Further, the Claimant union did not produce any witness or sworn witness statements from the said employees to confirm that they were indeed members of the trade union. As espoused under Section 107 of the *Evidence Act* which provides that:

“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.”
  39. Further, in *Alfred Kioko Muteti v. Timothy Mibeso & Another* [2015] eKLR it was held that a party can only discharge its burden of proof upon adducing evidence. Merely making pleadings is not enough. The court stated that:

“Thus, the burden of proof lies on the party who would fail if no evidence at all were given by either party.... Pleadings are not evidence, and it is not enough to plead particulars of negligence and make no attempt in one’s testimony in court to demonstrate by way of evidence how the accident occurred and how the 1<sup>st</sup> defendant was to blame for the said accident. It is trite law that he who alleges must prove and that burden does not shift to the adverse party even if the case proceeds by way of formal proof and or undefended.”
  40. Accordingly, the Claimant union lacks *locus standi* to institute the suit herein on behalf of the terminated employees and even if the grievants had a claim for unfair and illegal redundancy they had a right to file the suits in their own right.
  41. The court having considered the pleadings and submissions and also the citations holds that the claimant has not established its case on balance of probability and so the claim is not proved and is dismissed accordingly.
  42. Each party will meet their costs of their suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL, 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 15<sup>th</sup> March 2020 and subsequent directions



of 21<sup>st</sup> 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**

