



Banking Insurance & Finance Union v Patnas Sacco Society Ltd (Cause 106 of 2018) [2024] KEELRC 1625 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1625 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 106 OF 2018
DN NDERITU, J
JUNE 26, 2024**

BETWEEN
BANKING INSURANCE & FINANCE UNION CLAIMANT
AND
PATNAS SACCO SOCIETY LTD RESPONDENT

JUDGMENT

1. Through Judith Kubai Advocate, the claimant commenced this cause vide a memorandum of claim dated 6th November, 2018 filed in court on 7th November, 2018 wherein the claimant prays for –
 1. This honourable court is prayed to order that the Respondent serves its 2018/2017 CBA counter proposals on the claimant.
 2. This honourable court is prayed to order that the 2016/2017 CBA negotiations be conducted and concluded within a month from the date of the order.
 3. Costs of this claim
 4. Any other relief this honourable court deems just and necessary to award.
2. Together with the statement of claim, as is the procedure, was filed a verifying affidavit, a statement by the claimant, and a list and bundle of copies of the listed documents in support of the claim.
3. On 30th January, 2019 the respondent entered appearance through Bii V. K. & Co Advocates but no response was filed to the claim. However, the respondent’s advocates were allowed to cease acting for it on 7th November, 2022 following an application to cease acting as such.
4. With the leave of the court the claimant filed an amended memorandum of claim on 13th February, 2023 seeking the following –
 - a. Wage increment at 15% from January, 2016 to January, 2022.



- b. House allowance at the rate of 30% of basic salary subject to a minimum of Kshs.5,500/= per month.
5. On 27th February, 2023, on the application by counsel for the claimant, the court directed that the cause be heard and disposed of by way of written submissions. Counsel filed her written submissions on 26th April, 2023 but the respondent did not file any submissions.

II.Claimant's Case

6. As per the pleadings filed, the claimant is a duly registered trade union primarily representing employees in the finance and insurance sectors while the respondent is a duly registered limited liability company mainly serving tea farmers in Kericho County.
7. It is pleaded that the claimant and the respondent, formerly known as Buret Tea Growers SACCO, had a valid recognition agreement as a result whereof there was negotiated a collective bargaining agreement (CBA) for the period 2014/2015 which expired on 31st December, 2015.
8. There is no evidence on record informing or confirming that indeed the respondent herein is the same entity, related, or associated with the entity formerly known as Buret Tea Growers SACCO. However, this allegation is not denied and in fact, the CBA is executed by the respondent in the name in which it has been sued in this cause, but the recognition agreement was executed by the respondent in its former name.
9. Be that as it may, in February, 2016 the claimant wrote to the respondent urging to enter into negotiations for a new CBA following the expiry of the earlier one on 31st December, 2015. However, the respondent failed, refused, and or neglected to willingly engage in the process of negotiating a new CBA as a result of which the claimant filed this cause in court.
10. Following an application filed by the claimant alongside the initial memorandum of claim, the court (Marete J.) issued an order in the following terms –
 1. THAT the application dated 6th November, 2018 be and is hereby withdrawn.
 2. THAT parties be and are hereby ordered to sit, negotiate and come up with a settled collective Bargaining Agreement in the circumstances.
 3. Mention on 25.03.2019 for a report on settlement and the CBA.
11. The negotiations towards a new CBA did not materialize and as such no other CBA was entered into between the parties after the expiry of that of 2014/2015.
12. Although the respondent did not file a response to the claim, one of the documents filed by the claimant in court as part of its evidence is a letter by the respondent to the claimant dated 17th November, 2017 wherein the respondent asserted that its 19 employees who were members of the claimant had withdrawn their membership and attached a list duly signed by the 19 of its employees who were hitherto members of the claimant alongside their national identity card numbers. The letter purports that the said employees had withdrawn their membership with the claimant with effect from 1st December, 2017.
13. It is illustrative to note that in the entire pleadings and process filed in court the claimant has not named or mentioned or listed its alleged members who were allegedly working for the respondent. It is for this very reason that the court (Makau J.) in an order issued on 29th November, 2021 ordered “THAT the claimant to verify whether there are still union members at the respondent”. I have perused the court



file again and again looking for this confirmation and I have seen none. This is a very crucial aspect of this claim as shall be seen below.

14. In her written submissions counsel for the claimant submitted that the respondent has unreasonably failed, refused, and or neglected to take part in negotiations of a new CBA following expiry of the previous one on 31st December, 2015. In the circumstances, counsel urges the court to award as pleaded above borrowing heavily from a report from the Central Planning Monitoring Unit (CPMU).

III. Analysis & Determination.

15. In the witness statement of Mildred Anyikafiled in court on 7th November, 2018 the said witness states that she participated in recruitment of 19 employees of the respondent who became members of the claimant. The purported members are neither named nor identified. The recognition agreement filed is between the claimant and Bureti SACCO Society Limited and there is no evidence availed by the claimant to inform and confirm that indeed the said entity is the same one also known in the name of Patnas Sacco Society LTD, the respondent herein. However, the CBA alluded to above, signed on 28th August, 2014 and expiring on 31st December, 2015 was executed by the respondent in the name herein and in any event, the alleged change of name or identity has not been denied or contested by the respondent.
16. It is after the claimant forwarded its proposal on a new CBA and the respondent failed to respond thereto that the trade dispute was referred to the minister for conciliation but the conciliator could not resolve the matter ultimately issuing a certificate of unresolved dispute on 24th November, 2017. The dispute as captured by the conciliator was “Failure/refusal by the management to counter propose for 2016/17 collective bargaining agreement.”
17. It is unfortunate that the respondent did not file a response to the claim and as such the court does not benefit from its position on the subject matter on why it failed and or refused to enter into negotiations for a new CBA after the earlier one expired on 31st December, 2015. However, in a letter in the bundle of the documents filed by the claimant and reiterated in the affidavit of NELSON CHERUIYOT RONO sworn on 18th July, 2019 in response to an application by the claimant dated 19th June, 2019, the respondent states that the 19 of its employees who had been recruited as members by the claimant withdrew their such membership with effect from 1st December, 2017. In my understanding this is why the court (Makau J.) in an order issued on 29th November, 2021, alluded to above, directed the claimant to avail evidence that the purported 19 employees of the respondent were still members of the claimant union. As far as the record reads, the claimant did not avail that evidence other than counsel stating from the bar on 19th January, 2022 that there were such members.
18. This cause raises some basic yet germane issues in union membership and representation, CBA negotiations and obligations of the parties to engage, the duty of a party to a cause to prove its case to the required standard, and those are some of the issues that the court has to navigate through in arriving at a fair and just conclusion of this cause.
19. Trade unions as established under the *Labour Relations Act* are representative. They do not form or exist to self-serve or for the sake of it. They are an important cog in the tripartite nature of the labour nomenclature and equation comprising of the employer representatives, trade unions representing employees, and the government, the latter as the regulator. In that regard unions recruit members from employees serving in their representative sector based on their constitution and registered constitutive documents. One of the main activities and indeed duty for trade unions then is to enter into recognition agreements with employers and on that basis bargain and negotiate for and on behalf of their members for better and suitable terms and conditions of service resulting in CBAs.



20. It is on the above background that the claimant entered into a CBA with the respondent for and on behalf of its 19 employees. Intriguingly, the claimant has not supplied evidence on who the purported members are by name and identification. However, as stated elsewhere in this judgment, the respondent has provided a list of its 19 employees who were purportedly members of the claimant but the evidence on record is that the said membership ceased from 1st December, 2017.
21. As noted elsewhere in this judgment the court directed the respondent to avail evidence of continued membership of the purported membership but no such evidence was availed. It was incumbent upon the claimant to avail evidence and prove that indeed the said members were members as alleged and they continued to be such members for the entire period covered in the claim. This is for the very reason stated above that unions are created and exist to serve their membership as they hold no “personal” interest in such representation other than for the welfare of the membership. In that regard the union is the custodian of the records of membership and the standing and status of each member.
22. It is for the foregoing reason that the court finds and holds that the claimant failed to prove that indeed the purported members, whom the claimant did not even name, identify, or disclose to the court ever existed. In fact, it is the respondent that saved the situation by providing the names of the alleged 19 members but stated in the exhibit availed by the claimant that the said employees ceased to be such members with effect from 1st December, 2017.
23. If indeed the said members continued to be members of the claimant as alleged, nothing would have been easier than for the claimant to file and present evidence in that regard, may it be by records of continued membership, affidavits sworn by the said members in support of such continued membership, or indeed any other admissible evidence.
24. While Article 41 (1)(c) of *the Constitution* gives employees a right to form and join trade unions and engage in lawful activities thereof, this right must be read, construed, and understood alongside the right of association in Article 36 of *the Constitution* in that employees also have a right to exit, leave, discard, or dismember themselves from such unions.
25. While the letter of the members leaving the union was authored by the respondent, there is an annexed list of the 19 impugned members, complete with their national identity card numbers and their signatures appended. The claimant ought to have countered this with evidence as stated in an earlier part of this judgment confirming that indeed the said persons were still members of the claimant in the times material to this cause. The claimant failed to discharge that evidential burden.
26. On what basis then may this court find or hold that the claimant still held the membership of the 19 employees as alleged? The claimant has not availed the names and status of the alleged members, there is no evidence of payment of union dues, or indeed any other evidence of such membership save for the exhibit of the letter by the respondent dated 17th November, 2017 confirming the withdrawal of membership.
27. However, the evidence on record is that the respondent failed, refused, and or neglected to engage in negotiation of a new CBA after the expiry of the earlier one on 31st December, 2015. Consequently, the 19 employees of the respondent were denied the benefits of a CBA from January, 2016 until 17th November, 2017 when, going by the evidence on record, they ceased to be members of the claimant union.
28. But even then, were the 19 employees of the respondent without any cover of a CBA after 31st December, 2015? The answer is an emphatic no. In clause 2 of the CBA that expired on 31st December,



2015 it is provided that the terms of that CBA were to subsist until such a time as another CBA is entered into. The entire text of that clause is as follows –

Duration And Effective Date of Agreement

This agreement shall run for a period of twenty-four (24) months commencing from 1st January 2014 to 31st December 2015 provided that any time after October, either party may give to the other at least two (2) months' notice in writing of its desire for this agreement to continue in force for a further period to be agreed upon, or of its intention to terminate the agreement or alter any clause in the agreement.

In the latter event parties will enter into negotiations on the terms and conditions of a new agreement and until such a time as this is finalized the present agreement shall continue in force.

The terms of this agreement shall be subjected to any relative legislation enacted during the period of the agreement, which might necessitate alternation or amendment to the agreement.

29. The court has seen a report by the Central Planning and Monitoring Unit (CPMU) dated 8th June, 2022. The said report was not part of the evidence filed in court by the claimant but was apparently filed alongside the submissions by counsel for the claimant and without leave or order from the court. As a matter of fact, the copy in the court file does not even bear the court stamp of the date when it was filed and received in court. In the circumstances, the said report adds no value to the claimant's cause.
30. For all the foregoing reasons, the court finds and holds that the purported 19 members of the claimant working for the respondent as of the material time continued to serve on the same terms as those that they served as at the time of expiry of the CBA in force on 31st December, 2015, until December, 2017 when they, based on the evidence on record and in absence of any evidence from the respondent to the contrary, ceased to be members of the claimant.
31. Based on the foregoing finding and holding, the counsel for the claimant shall file in court within 14 days of this judgment and serve upon the respondent, a statement of any dues or payments, if any or at all, that may be due to the subject members for the period alluded to above (31st December, 2015 to 31st December, 2017) at the rates contained in the last CBA. If nothing is due and payable this matter shall be marked settled.
32. Those are the orders of the court with no order as to costs of the cause.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26TH DAY OF JUNE, 2024.

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DAVID NDERITU

JUDGE

