



**Kenya Building, Construction, Timber & Furniture Industries
Employees Union v Laminates Furniture Limited (Cause E359 of 2024)
[2024] KEELRC 2219 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2219 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E359 OF 2024
JK GAKERI, J
SEPTEMBER 18, 2024**

BETWEEN

**KENYA BUILDING, CONSTRUCTION, TIMBER & FURNITURE
INDUSTRIES EMPLOYEES UNION CLAIMANT**

AND

LAMINATES FURNITURE LIMITED RESPONDENT

RULING

1. Before the Court for determination is the Claimant Union’s Notice of Motion dated 9th May, 2024 filed under Certificate of Urgency seeking ORDERS THAT:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. This Honourable Court be pleased to issue Orders directing the Respondent to forthwith resume the deductions and remittances of union dues of all the 22 members who have joined the Claimant and signed forms.
2. The Notice of Motion is based on the grounds set out on its face and the undated Supporting Affidavit of Julius Macharia Maina. The Notice of Motion states that the Affidavit was sworn by F. K. Murage.
3. Mr. Julius Maina deposes that the salient issue was refusal by the Respondent to recognize the union and by 12th February, 2024, the union had recruited 23 employees of the Respondent out of a workforce to 29 and sent Form S to the Respondent signed by the 23 employees together with a Model Recognition Agreement on 19th February, 2024.



4. That the remaining 5 employees joined the union on 29th February, 2024 and the Respondent started directing employees issues to the Claimant union but declined to sign the Recognition Agreement and the dispute was referred to Conciliation on 6th March, 2024 and a Conciliator was appointed vide letter dated 19th March, 2024 and the 1st meeting was scheduled for 9th April, 2024 but the Respondent did not attend but denied the existence of a dispute vide letter dated 9th April, 2024 which the Claimant responded to and reported the Respondent's attempt to intimidate the employees to quit the union, though it commenced deduction of union dues from the members though unremitted. That by the end of March, 4 employees had left the Respondent's employment and one was deceased which reduced the number to 23 out of 24.
5. That the Respondent attended the conciliation meeting held on 15th April, 2024 and the Claimant was directed to resubmit its proposal but did not as it construed it as a delaying tactic.
6. That both parties attended the last meeting on 6th April, 2024 when the Claimant learnt that the Respondent had not deducted union dues for April 2024.
7. That at the meeting, the Respondent sought the Conciliator's advise on how to declare employees redundant to remove the Claimant from its workplace.
8. The affiant deposes that the Respondent had been summoning its employees to take their severance pay voluntarily but they had declined.

Respondent's case

9. By its Replying Affidavit dated 21st May, 2024, Mr. Bharat Dhokia deposes that Claimant's Supporting Affidavit is invalid and ought to be struck out with costs as it was commissioned by Mr. S.K.M Wandaka or SKM Wandaka or S K M Wandaka in the exact lettering does not appear in the Law Society of Kenya data base of Advocates.
10. The affiant disposes that there is no Advocate of the High Court of Kenya by the name S.K.M. Wandaka or S K M Wandaka or SKM Wandaka in the exact lettering appears in the LSK data base and as a Commissioner for Oaths must be an advocate, there is none by the name S.K.M Wandaka and there is no affidavit before the Court capable of supporting the Claimant's application dated 9th May, 2024 and the attachments are not marked as exhibits and are not commissioned by a Commissioner for Oaths and lack authenticity and no certificate of electronic evidence was availed.
11. The affiant deposes that the Notice of Motion is premature and unsustainable and no witness statements have been availed to confirm that the employees were members of the Claimant.
12. That Form S marked JMM-3 and JMM-14 are not marked as exhibits and not duly commissioned by a Commissioner for Oath and the signatures cannot be authenticated and are inadmissible and deducted union dues were reimbursed as the employees expressed their disinterest in the union and requested for their cash verbally.
13. That a copy of the conciliation certificate was not attached as prove that conciliation had failed.
14. That the Claimant appears to be in a hurry to seek Court Orders when other processes are on-going and conciliation is a binding dispute resolution mechanism under Article 159(2)(c) of *the Constitution* of Kenya.
15. In an affidavit dated 30th May, 2024 filed after directions on submissions had been given on 22nd May, 2024, but with leave, Mr. Julius Maina recounts the conciliation process as he had done in the



Supporting Affidavit and raised nothing new except the date which appears to have been the sole purpose of the Affidavit as it is not the Supporting Affidavit.

16. Strangely, Mr. Julius Maina filed a Further Supporting Affidavit dated 30th May, 2024 where he deposes that Mr. S.K.M. Wandaka is the Managing Counsel of S.K.M. Wandaka Advocates and an advocate of more than 40 years standing and had a current Practicing Certificate.
17. That the Respondent had unsuccessfully attempted to depopulate the Claimant's membership threshold by coercing members to quit but none had.
18. That the Claimant filed an affidavit under Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 that the Conciliation Process had taken more than 30 days and deemed it unresolved.

Respondent's response

19. By a Further Replying Affidavit dated 5th June, 2024, Mr. Bharat Dhokia deposes that Mr. S.K.M Wandaka's name does not appear in the LSK data base of advocates and there was no Commissioner of Oaths by that name and the Claimant's justification was hearsay and the Claimant's Affidavit and Further Supporting Affidavit dated 30th May, 2024 were invalid.
20. That no request for a Conciliation Certificate had been sought.

Claimant's submissions

21. On whether the application is premature, the Claimant relies on Section 74 of the [Labour Relations Act](#) to submit that issuance of a certificate by a conciliator is not mandatory as Section 69 is clear on the issue.
22. That Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 require an affidavit only on the reasons for the non-issuance of a Certificate.
23. As to whether recruited members had resigned, the Claimant submits that the Respondent's averment that it had refunded union deductions for March 2024 vide a verbal request was a good indication that the Respondent had violated the employee's constitutional right of association as it coerced them to accept the cash and they paid the amount to the Claimant union and signed another Form S.
24. It is the Claimant's submission that resignation of union membership is provided for by Section 48 of the [Labour Relations Act](#) and it is at the instance of the employee and must be in writing and as none of the 22 employees had written to the Respondent, the forceful refund amounted to harassment and a violation of their rights.
25. On union dues, the Claimant asserts that Section 48(3) of the [Labour Relations Act](#) requires an employer to deduct union dues as soon as Form S is received and remit the same to an account contained in the Ministerial Order as Gazetted.
26. Reliance was made on the sentiments of Onyango J. in K.B.C.T.F.I.E [Union v Twyford Ceramics Company Ltd E476 of 2020](#) on payment of union dues to urge that the Respondent should be compelled to resume payment of union dues.
27. On protection from harassment, the Claimant argues that Article 36 and 41 of [the Constitution](#) guarantee the right of an employee to belong to a trade union as do the provisions of the [Labour Relations Act](#) and Conventions 87 and 98.



28. That the Respondent's threats and intimidation towards its employees who joined the union denied them their constitutional rights
29. The Claimant prays that the Notice of Motion be allowed.

Respondent's submissions

30. As regards the Claimant's Supporting Affidavit, counsel submits that the same was invalid as held in *Allan Boesack Onyango v The Ewasi Ng'iro North Development Authority & 2 others* [2019] eKLR.
31. That the Applicant's exhibits annexed to the affidavit are not sealed by a Commissioner for Oaths under Rule 9 of the Oaths and Statutory Declaration Act Subsidiary Legislation and should be struck out.
32. Reliance was made on the sentiments of the Court in *Jason Edward Matus & another v Summit Gehlot & another; NEMA & 2 others (Interested Parties)* [2021] eKLR on the effect of non-compliance with Rule 9 of the Oath and Statutory Declaration Rules.
33. As to whether the Notice of Motion is premature, counsel submits that the Claimant had not placed credible evidence before the Court to justify the application after having initiated conciliation by writing to the Cabinet Secretary.
34. Reliance was also made on the sentiments of the Court in *Kenya Shoe and Leather Workers Union v Techno-Plast Ltd* [2024] KEELRC 100.
35. As to whether the Orders sought should be granted, counsel urges that they ought not be granted as the Notice of Motion is without a valid Supporting Affidavit and ought to be struck out as are the exhibits for want of seal by a Commissioner for Oaths.
36. Equally, the application is pre-mature as held in *Kenya Union of Road Contractors & Civil Engineering Workers v China Railway No. 5 Group Ltd* [2024] KEELRC 263 (KLR).
37. Counsel urges the Court to strike out the Notice of Motion with costs.

Analysis and determination

38. The issues for determination are;
 - i. Whether the Applicant's undated Supporting Affidavit was commissioned by a Commissioner for Oaths and exhibits were sealed as by law required.
 - ii. Whether the instant Notice of Motion is premature.
 - iii. Whether the Claimant union is entitled to the reliefs sought.
39. On the 1st issue, counsel for the Respondent argues vociferously that the Supporting Affidavit sworn by Mr. Julius Maina was not commissioned by a Commissioner for Oaths as the Law Society of Kenya data base for Advocates has no advocate by the name and style of S.K.M Wandaka or S K M Wandaka or SKM Wandaka as a Commissioner of Oaths is an Advocate. Counsel attaches a print out of the searches made which show no result was found.
40. The Claimant on the other hand vide the Further Supporting Affidavit sworn on 30th May, 2024 deposes that Mr. S.K.M Wandaka is an Advocate of more than 40 years standing and has a Current Practicing Certificate, a copy of which is attached.



41. Based on the evidence adduced by the Claimant, there is no reason to doubt that the copy of Practicing Certificate filed by the Claimant is genuine.
42. Intriguingly, the Claimant did not contend that a search of the Law Society of Kenya data base would yield different results which would appear to confirm the Respondent's position.
43. While an on-line search may not be conclusive evidence of the fact of appointment as a Commissioner for Oaths, it behooves the Law Society of Kenya to ensure that records on the portal are correct as it is a public portal and anyone is free to confirm the status of an advocate.
44. It defeats the purpose of having an on-line portal if every time a person sought to confirm the status of an advocate must write to the Law Society of Kenya to confirm the status of an advocate, which practice was hitherto.
45. The advocates page under the name Stanley Mwangi Kinuthia Wandaka, Admission Number [P105/1359/84](#) reveals the date of admission as 3rd September, 1984, place of work is Mfangano Trade Centre and Postal address is 6431 00200 NAIROBI.
46. As regards the sealing of exhibits annexed to an Affidavit, the Claimant did not submit on this issue. The Respondent's counsel on the other hand, urged that the documents were not sealed by a Commissioner for Oaths.
47. Rule 9 of the Oaths and Statutory Declarations, [Legal Notice 117 of 1983](#) provides that:-
All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification.
48. Rule 10 states that:-
The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.
49. Notably, both Rule 9 and 10 of the Oaths and Statutory Declarations Rules are couched in mandatory tone.
50. It is significant to appreciate that these rules were promulgated pursuant to the provisions of Section 6 of the [Oaths and Statutory Declarations Act](#), 1983 and are therefore statutory.
51. The sentiments of the Court in *Jason Edward Matus & another v Summit Gehlot & another* (Supra) cited by the Respondent's counsel are instructive as follows;

“On the other hand, I also beg to adopt the decision in the case of *Bosongo Medical Hospital & another v Mainstream Welfare Association & another* [2016] eKLR whereby the Honourable Court observed as hereunder.

“Although the point was not taken up by the plaintiff's the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a Replying Affidavit with annexures which are neither marked nor sealed with Commissioners stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the Replying Affidavit incomplete and therefore the same is also for rejection as without the annexures, it is valueless. This should serve as wake up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them and their clients as crucial evidence could be excluded owing to counsel's or their assistant's lack of attention and due diligence”.



52. The foregoing sentiments apply on all fours to the undated Supporting Affidavit sworn by Mr. Julius Macharia Maina.
53. See also Solomon Omwega Omache & another v Zachary O. Ayieko & 2 others [2016] eKLR.
54. In *Abraham Mwangi v S.O. Omboo & others HCCC No. 1511 of 2002*, Hayanga J. held as follows;
- “ Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case, the application fails and is dismissed”.
55. Similarly, in Francis A. Mbaranya v Cecilia N. Waema [2017] eKLR, the Court held that;
- “The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with . . . in the instant case, the law has provided in mandatory terms the manner in which evidence by way of annexures can be received by the Court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents . . .”
56. In the instant Notice of Motion, it is discernible that none of the annexures has been sealed under the seal of the Commissioner for Oaths, which is a mandatory requirement.
57. Guided by the foregoing judicial authorities, it is the finding of the Court that the exhibits annexed to the Applicant’s undated Supporting Affidavit of Julius Macharia Maina are non-compliant with the mandatory requirements of Rule 9 of the Oaths and Statutory Declarations Rules and are struck out of the record for purposes of the instant Notice of Motion.
58. As to whether the Notice of Motion is premature, parties have adopted opposing positions with the Claimant asserting that Section 69 does not make the requirement of Conciliation Certificate mandatory as the dispute is deemed unresolved after 30 days from the date of appointment of the Conciliator.
59. The Respondent’s counsel relies on case law to urge that the application is premature.
60. While Section 74(1) of the *Labour Relations Act* address circumstances in which urgent referrals may be made to the Employment and Labour Relations Court, such as disputes concerning recognition agreements or redundancies or retrenchments without notice, Section 69 addresses the circumstances in which a dispute is unresolved by conciliation and is the more relevant provision.
61. Section 69 of the *Labour Relations Act* provides that;
- A trade dispute is deemed to be unresolved after conciliation if the;
- a. Conciliator issues a Certificate that the dispute has not been resolved by Conciliation; or
 - b. Thirty day period from the appointment of the Conciliator or any longer period agreed by the parties, expires.
62. The Claimant argues that the Conciliator’s Certificate is not mandatory.
63. The opening sentence of Section 69 of the Act is unambiguous that the question whether a dispute is unresolved only arises after conciliation or 30 days from the date of appointment of the Conciliator.



64. In the Court's view, the 30 day period is only triggered if no conciliation is taking place as opposed to when the process is on-going as was the case in the instant case.
65. The Claimant triggered the conciliation process vide letter dated 6th March, 2024 and remained on course and attended meetings with the Conciliator.
66. According to the Applicant's Supporting Affidavit, the last meeting took place on 6th April, 2024 which is not the case as the second meeting took place on 15th April, 2024 and all parties attended and a 3rd meeting was slated for 22nd April, 2024.
67. From the documents on record, it is clear that the Conciliator convened a meeting on 6th May, 2024 at 8.00 am.
68. None of the parties furnished evidence as to what transpired.
69. What is not in doubt is that documents filed in Court are dated 9th May, 2024 barely 3 days after the date of the scheduled meeting.
70. In the absence of verifiable evidence as to what transpired on 6th May, 2024, it is discernible that the Conciliation Process was still on-going by the time the suit was filed.
71. In fact, the Respondent was to furnish the Conciliator with hard and soft copies of its proposals before 6th May, 2024 at amakori@labour.go.ke. This was occasioned by the fact that the Respondent had not provided its proposals by 22nd April, 2024.
72. In the Claimant's view, the Respondent and the Conciliator were working in cohort to frustrate the Claimant.
73. It is decipherable that the Claimant abandoned an on-going conciliation process as in its view it was taking too long yet the Conciliator was at the time awaiting the Respondent's written proposals and had thus not made any recommendations to the parties.
74. In the Court's view, the Conciliator's Certificate was necessary to contextualize the dispute, isolate and sticky points or impasse as the Claimant filed the instant suit as if there had been no conciliation.
75. The sentiments of Rika J. in Janet Mwacha Mwaboli v Modern Soap Factory Ltd [2019] eKLR are instructive that;

“Section 69 of the [Labour Relations Act](#) require the Conciliator to issue a certificate if the dispute is unresolved. Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 states that where the dispute has been the subject of conciliation, the statement of claim shall be accompanied by a report of the Conciliator on the conciliation process supported by minutes of the conciliation meeting. It is mandatory also to have the certificate of conciliation issued under Section 69, accompanying the statement of claim. Where there is no certificate of conciliation, the Claimant or his representative shall swear and file an affidavit attesting to the reasons why the Conciliator has not issued the certificate.

Where report has been made and conciliation has not taken place, the Claimant shall swear and file an affidavit attesting to reasons why conciliation has not taken place.

Conciliation is therefore meant to be a binding and effective dispute resolution mechanism with the court's intervention sought only when there are compelling reasons to do so. Parties can only move to the Court under Rule 5 above . . .



Non-adjudicatory mechanisms are anchored on Article 159(2)(c) of *the Constitution* of Kenya. They must be taken as binding and effective dispute resolution mechanisms, not merely as stepping stones to the judicial forum.”

76. As found in Kenya Shoe & Leather Workers Union V Techno-Plast Ltd (Supra), cited by the Respondent’s counsel, having invoked the conciliation process by reporting the dispute to the Cabinet Secretary, Ministry of Labour and Social Protection, the process was binding on the Claimant and could not unilaterally abandon the process and take refuge under Section 69 of the *Labour Relations Act*.
77. Article 159(2)(c) of *the Constitution* of Kenya enjoins courts and tribunals established by or under *the Constitution* to promote alternative forms of dispute resolution including conciliation and in mandatory tone.
78. Regrettably, the Claimant has not by cogent and verifiable evidence demonstrated why it abandoned the conciliation process mid-way as the Court is not persuaded that Section 69 of the *Labour Relations Act* avails it in this instance.
79. In the upshot, having found that the Claimant’s Supporting Affidavit lacks validity and having further found that the exhibits annexed to the Supporting Affidavit are non-compliant with the provisions of Rule 9 of the Oaths and Statutory Declaration Rules and the Claimant has not provided compelling reason(s) or justification for abandoning the conciliation process, it is clear that the Claimant’s Notice of Motion dated 9th May, 2024 is for dismissal and it is accordingly dismissed.
80. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

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