



**Kenya Building, Construction, Timber and Furniture Industries  
Employees Union v Laminates Furniture Limited (Cause E359 of 2024)  
[2024] KEELRC 2204 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2204 (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 AND FURNITURE  
INDUSTRIES EMPLOYEES UNION ..... CLAIMANT**  
**AND**  
**LAMINATES FURNITURE LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Applicant’s Notice of Motion dated 4<sup>th</sup> June, 2024 filed under Certificate of Urgency seeking orders that:-
  1. Spent.
  2. Spent.
  3. Spent.
  4. Spent.
  5. This Honourable Court be pleased to issue a declaration that the said 19 employees of the Respondent’s loss of employment was on account of discrimination for joining the trade union.
  6. Costs be in the cause.
2. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit of Julius Macharia Maina sworn on 4<sup>th</sup> June, 2024 who deposes that the Claimant by the instant application sought stay orders of any actions negating the Claimant’s claim for Recognition against the Respondent on 9<sup>th</sup> May, 2024 and the Court granted Orders against harassment on 22<sup>nd</sup> May, 2024.



3. The affiant deposes that on 25<sup>th</sup> May, 2024, the Respondent held a meeting/training with the employees and required them to sign employment contracts having served for various periods under oral contracts of employment.
4. That the written contracts of employment effective 1<sup>st</sup> June, 2024 made no reference to the duration served and the employees refused to sign the contract demanding that the served duration be provided for under the contract or be discharged first.
5. The affiant deposes that the Respondent demanded that the unsigned contracts be returned and on 27<sup>th</sup> May, 2024 and issued notices to show cause why disciplinary action should not be taken for failure to sign the contracts.
6. That all grievants attended the hearing indicated orally that they would only sign the contracts if the past period of service was incorporated into the written contract but the Respondent terminated the grievant's employment on 30<sup>th</sup> May, 2024.
7. That the grievants believe that the Respondent's actions were actuated by the recognition agreement and the dismissal was discriminatory.

### **Respondent's response**

8. By a Replying Affidavit sworn by Bharat Dhokia on 9<sup>th</sup> June, 2024, the deponent deposes that he is the Managing Director of the Respondent and prayers 2, 3, 4 and 5 of the Notice of Motion can only be granted upon full hearing of the parties and the remedy of reinstatement is not a temporary relief and no employee was dismissed on 30<sup>th</sup> May, 2024.
9. That the Notice of Motion lacks a valid Supporting Affidavit and should be struck out with costs as name of S.K.M Wandaka does not appear in the LSK Database of Advocates rendering the affidavit defective as a Commissioner for Oaths must be an Advocate of the High Court of Kenya.
10. That the exhibits and annexures to the Supporting Affidavit of Mr. Julius Maina are not securely sealed under the seal of the Commissioner for Oaths and thus cannot be authenticated and lack credibility, are inadmissible and should be struck out as they contravene Rule 9 of the Oaths and Statutory Declaration Rules and the documents filed by the Claimant are not accompanied by a certificate of electronic evidence or that the Claimant has authority to make the Supporting Affidavit.
11. The affiant deposes that a notice to show cause and invitation for a disciplinary hearing are lawful processes and cannot amount to harassment, thus the issue of disregarding Court Orders cannot arise.
12. That summary dismissal is a lawful process and the Claimant was inciting the Respondent's employees to ignore lawful processes by holding meeting at the Respondent's premises.

### **Claimant's submissions**

13. On whether the Claimant's documents are invalid for being commissioned by Mr. S.K.M Wandaka, the union submits that since the issue was raised in the earlier Notice of Motion dated 9<sup>th</sup> May, 2024, the Claimant provided a copy of the advocate's Practicing Certificate for 2024/2025 and urges that nothing prevented the Respondent from writing to the LSK for its response.
14. As to whether the grievants ought to be reinstated, the Claimant makes reference to the notice to show cause and cited the sentiments of the Court in Abraham Gumba V Kenya Medical Supplies Authority (2014) eKLR for a definition of insubordination.



15. The Claimant urges that the Court should interrogate the circumstances surrounding the notice to show cause as temporary orders not to harass the grievants had been made and the parties had a dispute over recognition of the Claimant.
16. That the Respondent had no reason to convert the oral contracts into writing and only did so after the dispute over recognition of the union arose.
17. The Claimant urges that the grievants dismissal was actuated by their joining the union and the dispute over recognition.
18. That the grievants have a constitutional right to join a trade union and dismissal on the ground of joining the Claimant is a violation of their rights and Section 46 of the *Employment Act* is explicit on the reason(s) for termination of employment. The Claimant prays for reinstatement and cited the sentiments of the Court in Anthony Njue John V National Bank of Kenya Ltd (2017) eKLR where Mbaru J. ordered reinstatement.
19. The Claimant urged the Court to decree the remedy of reinstatement.

### **Respondent's submissions**

20. By 12<sup>th</sup> August, 2024 when the Court retired to prepare this ruling, the Respondent had not filed its submissions.

### **Analysis and determination**

21. Puzzlingly, the Claimant/Applicant did not seek any orders pending the hearing and determination of the main suit perhaps because none of the orders sought are also sought in the main suit which is a legal requirement.
22. When the instant Notice of Motion came up in Chambers, the Court directed the Claimant to serve the application and it be responded to within 10 days and inter partes hearing was slated for 7<sup>th</sup> June, 2024 when the learned judge did not grant the orders sought and hearing was scheduled for and took place on 9<sup>th</sup> July, 2024 when the Court was informed that the Respondent dismissed all employees on 30<sup>th</sup> May, 2024.
23. The Court gave directions on the filing and exchange of submissions in respect of the two applications and parties had 14 days to comply.
24. While both parties filed and exchanged submissions for the Notice of Motion dated 9<sup>th</sup> May, 2024, only the Claimant union had filed submissions by 12<sup>th</sup> August, 2024 when the Court prepared this ruling.
25. The issues that commend themselves for determination are;
  - i. Whether the Applicant's Supporting Affidavit was commissioned by a Commissioner for Oaths and exhibits were sealed and marked as by law required.
  - ii. Whether the Claimant is entitled to the reliefs sought.
26. As to whether the Supporting Affidavit sworn by Mr. Julius Maina on 4<sup>th</sup> June, 2024 was commissioned by a Commissioner for Oaths, parties have adopted opposing positions with the Claimant submitting that it had availed Mr. Stanley Mwangi Kinuthia Wandaka's Practising Certificate for the current year is P. No. LSK/2024/08228 and he is a senior advocate having been admitted as an Advocate in 1984.



27. The Respondent maintained that the Lawyers name does not appear on the LSK Portal and the Supporting Affidavit is thus irregular.
28. According to the Respondent's counsel, a search on the Law Society of Kenya portal under the name S.K.M. Wandaka yields no results, which is factual.
29. However, the advocates page under the name Stanley Mwangi Kinuthia Wandaka shows that his Admission Number is [P105/1359/84](#) admitted on 3<sup>rd</sup> September, 1984, place of work is Mfangano Trade Centre and the Postal address is 6431 00200 Nairobi.
30. Concerning the sealing and marking of the exhibits attached to the Supporting Affidavit, the Claimant maintains that Mr. Stanley Mwangi Kinuthia Wandaka's Practicing Certificate for the year 2024 it attached is sufficient evidence that he is duly authorised to practice and the Court is in agreement.
31. Puzzlingly, however, the Claimant does not deny that a search in the Law Society of Kenya's online portal provides no results. It advises the Respondent to write to the Law Society of Kenya to confirm the advocate's status.
32. In the Court's view, since the validity of its Supporting Affidavit was queried by the Respondent, it was incumbent upon the Claimant to provide sufficient evidence to prove that indeed the affidavit is valid.
33. Regrettably, the Claimant did not contest the sealing and marking of the exhibits.
34. Rule 9 of the Oaths and Statutory Declarations Rules [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.
35. In addition, Rule 10 states that:-

The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.
36. Evidently, both Rule 9 and 10 are couched in mandatory tone and thus demand mandatory compliance.
37. It is noteworthy that these rules were promulgated pursuant to the provisions of Section 6 of the [Oaths and Statutory Declarations Act](#), 1983 and are therefore statutory and non-compliance is fatal to the admissibility of the affidavits.
38. The foregoing is fortified by the sentiments of the Court in Jason Edward Matus & another V Summit Gehlot & another (2021) eKLR 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".

39. The foregoing sentiments apply on all fours to the Supporting Affidavit sworn by Mr. Julius Macharia Maina on 4<sup>th</sup> June, 2024.
40. Equally, in *Abraham Mwangi V.S.O. Omboo & others HCCC No. 1511 of 2002*, Hayanga J. held thus;

“ 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”.
41. Finally, in *Francis A. Mbaranya V Cecilia N. Waema* (2017) eKLR, the Court held that;

“ The law that requires the sealing marking 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. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record and not the supporting affidavit and the application”.
42. See also *Solomon Omwenga Omache & another V Zachary O. Ayeko & 2 others* (2016) eKLR as well as *Fredrick Mwangi Ng'ang'a V Garam Investments & another* (2013) eKLR.
43. Can the failure to mark and seal the annexures be cured by the provisions of Article 159(2)(d) of *the Constitution* of Kenya?
44. In answering this question, the Court is guided by the sentiments of Mutungi J. in *Abdul Aziz Juma V Nikisubu Investments & 2 others ELC No. 291 of 2013* as follows;

“ Article 159 of *the Constitution* was never intended to override clear provisions of statute unless such provisions of the statute had been found and held to be unconstitutional. Acts of Parliament . . . make provisions for the application of the law and *the Constitution* demands of the Courts to protect *the Constitution*, the law and the acts enacted by Parliament. In my view, Article 159 of *the Constitution* cannot be resorted to where there are clear and express provisions of law”.
45. See also *Jeremiah Nyangwara Matoke V Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR.
46. The Court is in agreement with the foregoing sentiments.
47. Guided by the foregoing judicial authorities and having noted that none of the 84 exhibits is neither sealed under the seal of a Commissioner for Oaths nor marked as required by Rule 9 of the Oaths and Statutory Declaration Rules, the same are expunged from the record, the effect of which is that the Claimant's Notice of Motion dated 4<sup>th</sup> June, 2024 is neither supported by an affidavit nor exhibits.
48. It is unsustainable and it is accordingly dismissed for want of proof.



49. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18<sup>TH</sup> 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 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 *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**

