



**Kenya Union of Commercial Food and Allied Workers v Nanak
Engineering Works Limited (Employment and Labour Relations Cause
E006 of 2024) [2024] KEELRC 2728 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2728 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2024
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

NANAK ENGINEERING WORKS LIMITED RESPONDENT

RULING

1. The Claimant filed this suit on 19th February 2024. On the same date, the Claimant filed the Notice of Motion application dated 14th February 2024 under Certificate of Urgency, seeking the following orders;
 - i. That this application be certified as urgent service thereof be dispensed with and the same be heard ex-parte in the first instance.
 - ii. That pending hearing and determination of this matter, this court be pleased to issue an Order restraining the Respondent from victimizing, intimidating, coercing, harassing, terminating, dismissing or disciplining the Claimant's members whose names appear on the check off forms on account of their union membership.
 - iii. That pending hearing and determination of this matter, this court do direct the Respondent to deduct and remit union dues as already authorized by Union members through the check off sheets.
 - iv. That this court sets this matter for hearing and determination on priority basis
 - v. That costs of this application be in the cause.



2. On 2nd April, 2024 the Respondent filed a Notice of Preliminary Objection of the same date. The grounds of the Respondent's Preliminary Objection are as follows: -
 - i. That whereas there is a business known as Nanak Engineering Works, there is no Legal entity known as Nanak Engineering Works Ltd and the claim is therefore fatally defective
 - ii. That the Nanak Engineering Works is in a sector or industry which does not relate to the Claimant's Constitution.
 - iii. That the Claimant is a busy body and has no locus to deal with the Respondent.
 - iv. That Claimant's union having not qualified to recruit members from the Engineering industry cannot be accommodated by the Respondent.
 - v. That the action of the Claimant in purporting to recruit members from the engineering sector/ industry is ultra-vires its constitution and hence a nullity.
 - vi. That this claim is therefore incompetent and an abuse of the court process and should be struck out with costs.
3. On 18th March 2024, the court directed parties to proceed on the Preliminary Objection by way of written submissions. I have perused the record and found submissions for both parties. The Respondents submissions are dated 2nd May 2024 whereas the Claimant's submissions are dated 3rd June 2024.
4. The Respondent in its submissions averred that the certificate of registration exhibited as annexure HS2 is to the effect that the business name Nanak Engineering Works is carried by three persons namely, Harinder Kaur w/o Harjinder and ManuPreet Singh and that the three persons are the ones trading as Nanak Engineering Works which is different from a company which has distinct legal personality and separate identity to that of its directors or members.
5. The Respondent submits that the claim is directed to a non-existent entity hence incompetent and ought to be struck out.
6. The Respondent has also submitted that the Claimant is only empowered to recruit its members from the sectors of commercial food and allied workers as evidenced by Rule no. 5 of its Constitution and that the Claimant has been actin ultra vires its constitution by engages the employees of Nanak Engineering Works which is an engineering entity.
7. In its submissions, the Claimant contended that suing of Nanak Engineering Works Limited was purely a typographical error. The Claimant avers that in the letter dated 24th July 2023 it addressed to the Respondent in their correct name Nanak Engineering Works. The Claimant cited Article 159(2) (d) of the Constitution and urged the court to administer justice without undue regard to technicalities.
8. As regards grounds ii, iii, iv, v and vi of the Preliminary Objection, the Claimant submits that Article 41(2)(c) of the Constitution and section 4(1)(a) and (b) of the Labour Relations Act guarantees the right to join a union and participate in the activities of such union.
9. The Claimant submits that there is no any other union representing labour interests of workers at the Respondent's premises and the employees willingly subscribed to the Claimant's union. It is further submitted that no other trade union has come forth to claim that the Claimant union herein encroached into their area and sphere of representation.



10. It is the Claimant's contention that the Respondent cannot purport to dictate which union their employees should join since the Constitution guarantees the freedom of choice to associate and belong to a trade union.
11. The Claimant submits that a trade union seeking to be recognised by an employer has to meet the requisite threshold of having majority membership of the particular institution and that in this case, the Claimant has met this threshold and there is no other Union that has recruited the Respondent's employees.
12. It is therefore the Claimant's submission that it has not acted ultravires as per its constitution and since the Respondent is also in the commercial sector selling spare parts to its clients, this qualifies its employees to belong to the Claimant as its members.
13. This court only needs to determine one issue in this matter at this point, whether the preliminary objection is merited.
14. In the case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors*, (1969) EA 696, the court observed as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
15. The Respondent argues that the Claimant sued a different entity and also, that from the Claimant's constitution, the Respondent's employees do not qualify to join the Claimant's trade union.
16. Since the application and the claim giving rise to this preliminary objection forms part of the record of this court, it is quite easy to refer to them and ascertain some facts through a scrutiny of the pleadings.
17. Firstly, as regards the objection raised by the Respondent that the Claimant has sued a non-existent entity, that is Nanak Engineering Works Limited instead of Nanak Engineering works, I have examined the Certificate of Registration marked HS2 and noted that indeed, the Respondent herein is registered as Nanak Engineering Works and not Nanak Engineering Works Limited.
18. The Claimant on its part has attributed this to a typographical error. In this regard the court was referred to the letter dated 24th July 2023 addressed to the Respondent by the Claimant. I have perused said letter and it is clear that the Claimant in that letter addressed the Respondent as Nanak Engineering Works. I therefore find that the suing of the Respondent as a Nanak Engineering Workers Limited by the Claimant was a typographical error which does not go to the root of the matter.
19. On the other issue, the Respondent submitted that Nanak Engineering Works is in a sector or industry which does not relate to the Claimant's constitution and that the Claimant has no locus to deal with the Respondent.
20. Section 54(8) of the Labour Relations Act, 2007 provides that when determining a dispute under this section, the Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.
21. I have perused the Claimant's constitution. Rule 5 is on membership and it provides as follows:

Rule No.5: Membership



Membership of the Union shall be open to all employees engaged in the following industrial sectors/ industrial groups provided that such employees are above the apparent age of (18) eighteen years: -

(a) Distributive & Commerce Sector:

Which shall embrace all employees engaged or employed in: -

- (i) Warehouses, Merchandises, Import and Export business
 - (ii) Flour, coffee & spice Mills
 - (iii) All Food Processing Industries
 - (iv) Banks, Insurance and Financial Institutions
 - (v) Cinema halls, Show grounds and Exhibitions
 - (vi) Supermarkets, Shops, Retail and Wholesale outlets, Distribution and Supply Companies.
 - (vii) Dairy and milk Industries
 - (viii) Co-operative Societies
 - (ix) Statutory Boards
 - (x) Slaughter Houses and butcheries
 - (xi) Property management
 - (xii) Cooking oil refineries
 - (xiii) Water Conservation and Pipeline Corporation and water service regulatory boards.
- (b) Bottling & Brewing Sector Which shall embrace all employees engaged or employed in bottling, brewing, distilling of alcoholic beverages, bottling of soft drinks and drinking water.
- (c) Laundry Cleaners & Dyers Sector Which shall embrace employees engaged in dyeing, dry cleaning services and laundry industries,
- (d) Tobacco Trade Sector
- Which shall embrace all employees engaged in tobacco manufacturing industries,
- (e) Union Officials
- Which shall embrace all full time Officials of the Union.

22. This court in the case of Kenya Plantations & Agricultural Workers Union v Kenya Chemical & Allied Workers Union & 2 others [2018] eKLR observed as follows:

“I must start by affirming that employees have a constitutional right to join membership of a union of their choice. However, the trade unions are required to specify in their



constitution, the scope of its membership. It is thus restricted to recruit membership only from the sector in which its constitution limits it.”

23. In the Memorandum of Claim the Respondent is described as a shop stocking and selling engineering appliances including scrapes, spare parts and other hardware. The Respondent has not filed a response to the Memorandum of Claim and has not confirmed or denied the averments in the Memorandum of Claim.
24. If what is pleaded in paragraph 2 of the Memorandum of Claim is true then the Claimant would be the appropriate union under Rule 5 (a) (vi) of its membership clause which reads:

“(vi) Supermarkets, Shops, Retail and Wholesale outlets, Distribution and Supply Companies.”
25. Further, it would mean that this is not a matter for determination by way of preliminary objection which as defined in the case of Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors where a preliminary objection was defined as arising from a pure point of Law which is argued on the assumption that all facts pleaded by the other side are correct. If a matter is contested then it would require proof through evidence and would thus not be suitable for determination as a matter of preliminary objection.
26. From the foregoing, I find that the Respondent has not satisfied the court that the issue whether or not the Claimant has locus to represent its employees is a matter for determination by way of a preliminary objection as the question is a matter that requires proof by way of evidence.
27. The preliminary objection therefore fails and is accordingly dismissed.
28. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024.

MAUREEN ONYANGO

JUDGE

