



**Kenya Union of Commercial Food & Allied Workers v Gusii Water & Sanitation Co Ltd (Cause E046 of 2024) [2024] KEELRC 13472 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13472 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E046 OF 2024  
JK GAKERI, J  
DECEMBER 19, 2024**

**BETWEEN  
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT  
AND  
GUSII WATER & SANITATION CO LTD ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the applicant union's Notice of Motion dated 29<sup>th</sup> May, 2024 filed under Certificate of Urgency seeking Orders that:
  1. Spent.
  2. Spent.
  3. The Honourable Court do issue Orders restraining the Respondent from victimizing, intimidating, coercing, harassing, terminating or disciplining the Claimant's members/shop stewards pending hearing and determination of the main suit.
  4. The Honourable Court Orders the respondent to continue deducting and remitting the current monthly union dues to the claimant on time pending the hearing and determination of the main suit.
  5. The Honourable Court issues an Order directing the respondent to continue deducting and remitting union dues every month without fail.
  6. The Honourable Court issues any other Order it deems fit.
  7. Costs of this application be provided for.
2. The Notice of Motion is expressed under Section 12 of the *Employment and Labour Relations Court Act*, Section 18 of the *Employment Act*, Section 48, 52 and 54 of the *Labour Relations Act* and the



Employment and Labour Relations Court (Procedure) Rules, 2016 and it is based on the grounds outlined on its face and the Supporting Affidavit sworn by Mr. George Obong'o who deposes that he recalls that the respondent's employees who joined the union were far above the 51% threshold and check off forms were forwarded to the respondent and a Recognition Agreement signed on 2<sup>nd</sup> February, 2015 and union dues have not been paid over the years though deducted and the respondent has not been responsive on the issue and the dispute was reported to the Cabinet Secretary on 24<sup>th</sup> October, 2023 and conciliation was undertaken and the conciliator made recommendation made on 16<sup>th</sup> January, 2024 which the applicant accepted but the respondent indirectly confirmed its unwillingness to remit deducted dues prompting the instant application.

3. According to the applicant the respondent owes it Kshs.1,823,848.00 as of September, 2023 which has affected the applicants operations and it should be compelled to pay the sum with interest at 14% or at court rates.

### **Response**

4. By a Replying Affidavit sworn by Mr. Stephen Rosana on 18<sup>th</sup> September, 2024, the affiant deposes that he is the Human Resource Officer of the Respondent and the respondent's employees were unionised under the Kenya Union of Water and Sewerage Employees (KUWASE) and the applicant was the former union and had no locus standi to sue on behalf of the employees who belong to another union and is not entitled to any deductions.
5. That the respondent has a valid Recognition Agreement with KUWASE and had been remitting dues to the union.
6. That the applicant has been filing numerous claims against the respondent on behalf of persons who are not employees of the respondent and the instant application is frivolous, incompetent and vexatious intended to extort the respondent and ought to be dismissed.

### **Applicant's submissions**

7. Strangely, the union makes reference to ELRC Cause No. 3 of 2022 without disclosing who the parties were, issues and determination.
8. The union argues that after signing the Recognition Agreement in 2015, the respondent was statutorily required to deduct and remit union dues under Section 48 of the *Labour Relations Act* and although it did so in 2015 and 2016, it defaulted and had agreed to settle the same by instalments during conciliation and did not dispute the figures but prayed for time to pay.
9. Reliance was made on Section 50 of the *Labour Relations Act* on remission of union dues by an employee.
10. That the amounts due for 2016 to 2023 are undisputed save for 2024 and the applicant is unaware of KUWASE or any dealings it may have had with the respondent do not absolve it from paying accrued union dues and continuation of deductions of dues as the applicant was unaware of a rival union receiving dues.
11. The applicant denies having filed suits against the respondent.

### **Respondent's submissions**

12. Counsel urges that the applicant had not met the threshold for the issuance of interim Orders and had neither proved a prima facie case or irreparable injuries.



13. It is Counsel's submission that the respondent's employees were former members of the applicant and had since moved to KUWASE and the respondent had a CBA with the union and remits union dues to it yet the applicant maintains that the employees are its members.
14. Counsel submits that since the issue of union membership is contested, the matter ought to be scheduled for hearing of the main suit for parties to avail evidence.
15. Counsel urges that the respondent stood to suffer irreparable harm if the Orders sought are granted as the applicant had no capacity to refund the same in the event it is found that the amount was not deserved.
16. That granting the Orders sought would occasion industrial disharmony as two unions were competing for the same employees.
17. Reliance was made on the sentiments of the Court in *Kenya Nut Company Ltd V Kenya Plantation & Agricultural Workers Union & Another* to reinforce the submission.

### **Analysis and determination**

18. A perusal of the Court record reveals that the applicant lodged this application on 31<sup>st</sup> May, 2024 under Certificate of Urgency and directions on service were given on 3<sup>rd</sup> June, 2024 and inter partes hearing scheduled for 17<sup>th</sup> June, 2024, which was declared a public holiday and hearing was postponed to 10<sup>th</sup> July, 2024, on which date the respondent's counsel sought time to respond and was granted 7 days and the hearing slated for 24<sup>th</sup> September, 2024 did not proceed as the respondent had not responded and hearing was pushed to 22<sup>nd</sup> October, 2024.
19. Strangely, at no time did the applicant object to the respondent being granted more time or urge the urgency of the matter yet the respondent had not responded by 24<sup>th</sup> September, 2024 and did not file a response until 25<sup>th</sup> September, 2024.
20. It is thus not surprising to the Court that the suit was initiated under Certificate of Urgency which the court did not certify the application urgent.
21. The applicant's case is simply recovery of unremitted union dues amounting to Kshs.1,823,848.
22. Additionally, it is the main relief sought in the main suit in addition to the respondent continuing to deduct and remit union dues.
23. Although the Claimant/applicant did not attach a copy of the Recognition Agreement between the parties, by letter dated 29<sup>th</sup> June, 2020 addressed to the General Secretary Kenya Union of Water & Sewerage Employees (KUWASE), the Managing Director of the respondent, one Mr. Osborn Nanga admitted that the respondent had an existing Recognition Agreement with the Applicant union signed on 2<sup>nd</sup> February, 2015 and the same was subsisting at the time.
24. The Managing Director of the respondent was unambiguous that the respondent could not sign or action the Recognition Agreement sent by KUWASE's General Secretary.
25. However, from the documents filed by the respondent it is discernible that the respondent had a relationship with KUWASE from sometime in late 2023 or early 2024 and has been deducting and remitting union dues to it, a fact the applicant appears to be aware of as its submissions suggest.
26. It is unclear to the Court as to when tables turned against the applicant as they have, an undisguised fact the applicant is resisting.



27. Although it is true that the applicant and the respondent signed a Recognition Agreement in February, 2015, the applicant is reticent on whether it concluded a CBA as that's the purpose of a Recognition Agreement.
28. Similarly, the applicant has not attached any evidence of the membership it has had over the years since 2015 bearing in mind that trade union membership is dynamic.
29. In addition, it has not disclosed how much it has been receiving against the expected sum and the shortfall or the reasons provided by the respondent if any.
30. Without verifiable evidence of the number of members the union had for every year it is claiming unpaid union dues, it is difficult for the Court to award an unsubstantiated amounts or indeed make interim Orders for the respondent to continue deducting union dues for unknown members or restrain the respondent from taking action against undisclosed union members.
31. The absence of essential details is exacerbated by the fact that Mr. George Okongo, the affiant of the applicant's Supporting Affidavit states:

That I can recall the Respondent's unionisable workers who voluntarily joined the union were far above the 51% required by law”
32. This statement refers to 2<sup>nd</sup> February, 2015 and may have been factual at the time but was it factual in 2017, 2018, 2019, 2020, 2021, 2022 and 2023?
33. More significantly what was the number of unionisable employees of the respondent then and how many of them voluntarily joined the applicant union.
34. Without real and verifiable number of employees who were and have been members of the union since 2015 and those who joined thereafter including those who left or ceased to be employers, it is a herculean task for the applicant to qualify for the grant of the interim Orders sought here in.
35. Section 48 of the *Labour Relations Act* provides that:
  - (1) In this Part "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.
  - (2) A trade union may, in the prescribed form, request the Cabinet Secretary to issue an order directing an employer of more than five employees belonging to the union to—
    - (a) deduct trade union dues from the wages of its members; and
    - (b) pay monies so deducted—
      - (i) into a specified account of the trade union; or
      - (ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.
  - (3) An employer in respect of whom the Cabinet Secretary has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.
  - (4) The Cabinet Secretary may vary an order issued under this section on application by the trade union.



- (5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.
- (6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.
- (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.
- (8) An employer shall forward a copy of any notice of resignation he receives to the trade union.
36. These provisions are clear that an employer is obligated to deduct and remit union dues in respect of employees who are members of the union and who have signed Form S, which suggests that at any given time the union is aware of the number of employees who are its members and against whose wages union dues are deductible.
37. Similarly, Section 19(1)(f) and (g) of the *Employment Act* provides for deduction from wages of an employee of the following: -
- (f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
- (g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages.
- 38,. Clearly, both Section 48 of the *Labour Relations Act* and Section 19 of the *Employment Act* authorise deduction of union dues and the employer is obligated to effect the deductions once an employee signs the check off forms (FORMS).
39. The foregoing means that at any given time, the union is generally aware of the number of employees who are its members in a given organization who union dues are deductible and the amount due.
40. In *Kenya Concrete Structural, Ceramic Tiles Wood Plys and Interior Design Workers Union V Wanxin Investments Ltd [2021] eKLR Rika J.* held that: -
- Deductions and remittances of trade union dues flows from relevant ministerial Order and check-off forwarded to the Respondent by the Claimant.
- Check-off forms have been forwarded to the Respondent and receipt acknowledged. There is no reason for the respondent not to act on check-off forms, by deducting and remitting trade union dues relating to undisputed members of the Claimant”.
- See *Lochab Brothers Ltd V Transport Workers Union [2024] V KECA 965 (KLR)*.
41. The Court is in agreement with these sentiments.
42. In the instant case, it requires no belabouring that the Orders sought require the availment of evidence to demonstrate that the applicant has a prima facie case against the respondent for the Orders to issue.
43. Regrettably, the applicants evidence on record so far falls below the requisite threshold as the claimant has not provided some indication as to how many members it had in 2015, 2016, 2017, 2018, 2019, 2021, 2021, 2022 and 2023 as it has conceded that in 2024, its members appear to have slipped away to a rival union.



44. The applicant would have reinforced its case with statistics of membership over the years as opposed to relying on generalized statements that employees who joined its membership in 2015 were above the 51% threshold without disclosing the numbers.
45. Deductions and remittance of union dues entails numbers of employees and the number is specific and translates to money, all of which are certain or capable of being ascertained.
46. On a different issue, the applicant seeks orders to restrain the respondent from victimizing, intimidating, coercing, harassing terminating or disciplining the claimant's members/shop stewards pending the hearing and determination of the suit.
47. Surprisingly, neither the Supporting Affidavit nor any other document refers to the issue.
48. Significantly, none of the claimant's members/shop steward(s) swore an affidavit on the issue or allege that any of the activities sought to be restrained took place or have been taking place or are likely to take place in the meantime.
49. The upshot of the foregoing is the claimant has failed to prove on a balance of probabilities that it is entitled to any of the Orders sought in the Notice of Motion dated 29<sup>th</sup> May, 2024 pending the hearing and determination of the claim.
50. Consequently, the Notice of Motion is dismissed with no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 19<sup>TH</sup> DAY OF DECEMBER, 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**

**DRAFT**

