



**Kenya Engineering Workers Union v Thorlite Kenya Limited (Cause E338 of 2023) [2024] KEELRC 13370 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13370 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E338 OF 2023  
SC RUTTO, J  
DECEMBER 6, 2024**

**BETWEEN**  
**KENYA ENGINEERING WORKERS UNION ..... CLAIMANT**  
**AND**  
**THORLITE KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant which is a trade union registered under the *Labour Relations Act*, avers that in March 2023, it had recruited a total of 17 employees of the Respondent into its membership.
2. That on 16<sup>th</sup> March 2023 and 21<sup>st</sup> March 2023, the Claimant wrote to the Respondent demanding deduction of union dues in accordance with Section 48 of the *Labour Relations Act*, enclosing a recognition agreement for the parties to sign for them to embark on collective bargaining to cover new terms and conditions of employment for its members. That it sent reminders on 31<sup>st</sup> March 2023 and 6<sup>th</sup> April 2023.
3. On 17<sup>th</sup> April 2023, the Respondent wrote to the Claimant declining recognition. Subsequently, the Claimant sought assistance from the Ministry of Labour but the Respondent increased victimization of the workers.
4. It is against this background that the Claimant prays for the following reliefs:
  - a. That the Respondent be ordered to recognise the Claimant union.
  - b. That the Respondent be ordered to sign a recognition agreement with the Claimant union with immediate effect.
  - c. That the Respondent be ordered to deduct union dues from its employees who are members of the Claimant union and forward them to the Claimant union's account.



- d. That the Respondent be ordered to engage in collective bargaining with the Claimant union.
  - e. That costs be provided for in favour of the Claimant.
5. The Respondent has opposed the Claim through its Response dated 1<sup>st</sup> November 2023. The Respondent does not contest that the Claimant has recruited into its membership some of its employees who are 17 in number. While admitting that it received correspondence from the Claimant, the Respondent contends that before they could give feedback on the subject matter, the Claimant was on its neck by sending officers to its premises who were issuing threats of taking the Respondent's director's passport and deporting him if the company does not comply with the Claimant's demands.
  6. According to the Respondent, at no point did it deny the Claimant's right to engage with their members within their premises. The Respondent states that the Claimant abused this privilege by constantly harassing and threatening staff if their demands were not actuated.
  7. The Respondent further avers that in their analysis, the Claimant has recruited 17 out of 39 employees and this does not meet the simple majority threshold which is fifty plus one members as envisaged by the *Labour Relations Act*.
  8. The Respondent has further averred that at no point in time has it engaged in acts of victimization and all the disciplinary measures taken were carried out without any malice or ill intention and its actions were justified by the *Employment Act*.
  9. It is on account of the foregoing that the Respondent has asked the court to dismiss the Claim with costs.
  10. It is worth pointing out that in its Ruling which was delivered on 27<sup>th</sup> September 2023, this court allowed the Claimant's Application dated 26<sup>th</sup> April 2023 in the following terms:
    - a. The Respondent do forthwith commence deductions and remittance to the Applicant's gazetted bank account, dues from the employees who have duly signed Form S and acknowledged union membership to the Applicant union.
    - b. Pending the hearing of the main suit, the Court confirms its orders of 27<sup>th</sup> April, 2023 and the Respondent is restrained from victimizing any of its employees on account of their union membership or participation in union activities.
  11. The matter proceeded for hearing on 29<sup>th</sup> April 2024 and 25<sup>th</sup> July 2024, during which both parties called oral evidence.

### **Claimant's Case**

12. The Claimant called oral evidence through Mr. Joseph Muendo who testified as CW1. Mr. Muendo identified himself as an employee of the Claimant Union with his designation being the Member Recruitment Officer, Nairobi Region. At the outset, Mr. Muendo adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Claimant as exhibits before Court.
13. Mr. Muendo told the Court that he is familiar with the facts of the case herein. That in the month of March 2023, during a recruitment drive at the Respondent company, he met with their unionisable members, totaling 17 in number. He was able to recruit all of them into the membership of the Claimant Union.



14. He averred that all 17 employees signed check-off forms accepting to be members of the Union. He submitted the said forms to the Claimant Union offices for onward communication to the Respondent.
15. Mr. Muendo averred that on 15<sup>th</sup> March 2023, the Claimant's Secretary General, wrote to the Respondent, informing them that the Union had recruited all their unionisable members, attaching the check-off forms and requesting/demanding the signing of a Recognition Agreement, as a precursor to collective bargaining of new terms and conditions of employment for the Claimant's members.
16. The Respondent, wrote back on 17<sup>th</sup> April 2023, declining to recognize the Claimant Union.
17. Towards the end of April 2023, he was informed by some of the members he had newly recruited that they were being harassed and intimidated due to their decision to join the Claimant Union. The said members reached out to the Union seeking intervention to protect them from harassment and victimization.
18. Mr. Muendo further stated that the first group of complainants alleged that the Respondent had refused to renew their contracts of service. This is despite the fact that they had served the Respondent for a number of years and had been put on fixed-term contracts after resumption of work after the COVID-19 pandemic.
19. The next group of complainants alleged that the Respondent had become unusually high-handed in handling disciplinary cases against employees who were members of the Union. They cited instances where they were being subjected to disciplinary proceedings for alleged issues that had occurred long before they were issued with show cause letters.
20. Mr. Muendo averred that on 28<sup>th</sup> April 2023, the Respondent proceeded to issue three of its employees with termination letters, in contravention of the Court order issued on 27<sup>th</sup> April 2023. A few days later, the Respondent summoned the said employees, recalled the letters of termination, and issued them with suspension letters instead.
21. From his investigations, in consultation with members of the union who were still in the Respondent's employment, he was informed that the Respondent had inflated their unionisable employee numbers to appear as though the Claimant had not met the threshold for recognition. In his view, this was done by including members of staff who had left the organization, and by listing as employees others, so that the numbers do not meet the 50%+1 required for recognition.
22. Mr. Muendo further averred that he has been the primary liaison between the Claimant Union and the Respondent, and at no time has he ever engaged in unfair labour practices including threats and intimidation to the directors or employees of the Respondent.
23. In closing, Mr. Muendo asked the Court to issue an order compelling the Respondent to recognise the Claimant union for purposes of collective bargaining.

### **Respondent's Case**

24. The Respondent called oral evidence through its Director, Mr. Atul Patel who testified as RW1. Mr. Atul adopted his Supporting Affidavit sworn on 1<sup>st</sup> November 2023 to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.
25. It was Mr. Atul's evidence that the Respondent is alive to the labour law provisions and at no time, have they made steps towards preventing, curtailing and subverting their organizing and recruitment activities within its premises.



26. Mr. Atul contended that fair labour practices do not only apply to the Claimant but equally apply to the Respondent and should not be subjected to threats and intimidation of sorts by anyone in the name of actualizing their labour rights.
27. He is also alive to the provision of Article 41 of *the Constitution* of Kenya, guaranteeing every worker the right to form and join a trade union of choice and do so without any form of victimization. It is Mr. Atul's contention that this right does not entail the employer condoning misconduct by workers in their pursuit of having a recognition agreement nor is it a panacea for actions of gross misconduct by employees.
28. It was Mr. Atul's further evidence that at no particular point in time, has the Respondent been engaged in acts of victimization and all disciplinary measures taken by the Respondent were justified by the *Employment Act* as follows:
- i. Employees failed without leave of absence to turn up to their workplace and on resuming they never at all cared to inform the employer of the reasons why they failed to turn up nor issue communications to the employer to that effect;
  - ii. The employees were given an opportunity to justify their actions through a fair disciplinary hearing but only one gave a lawful reason.
  - iii. The trade union was invited to this disciplinary hearing and they failed to appear.
29. Mr. Atul further contended that absence from work by any employee cannot in any way be attributed to "fabrication of indiscipline issues" by the Respondent as this can only be attributed to the employees' conduct.
30. In Mr. Atul's view, had the Respondent been malicious and mischievous in their action, they would not have given the employees sufficient time to prepare for their defense, considered the hearing of each employee and given them an opportunity to be represented by a union official of their choice and considered whether their actions had a lawful cause or not.
31. He added that after the hearing, the Respondent retained one employee who gave a lawful cause for being absent without leave. According to him, this does not indicate victimization.
32. Mr. Atul further contended that the Claimant cannot be allowed to have their own cake and eat it as they were well aware through their members of the scheduled disciplinary hearing but failed to appear.
33. According to Mr. Atul, the Claimant knowing very well the consequences of gross misconduct under the employment law is using victimization as a blanket to cover up for the misconduct their members were engaged in.
34. It was his further evidence that in the Respondent's analysis, the trade union has recruited 17 out of 39 employees and this does not meet the simple majority threshold which is fifty plus one members as envisaged by the *Labour Relations Act*. This was well communicated to the Claimant via the Respondent's correspondence dated 17<sup>th</sup> April 2023. In Mr. Atul's view, this does not amount to a refusal to sign a recognition agreement with the Union.
35. He further averred that the issue of recognition is an issue of numbers and the Claimant has not achieved the requisite number to warrant the Respondent to sign a recognition agreement with them.



## Submissions

36. On the Claimant's part it was submitted that the timing by which the Respondent moved to take drastic disciplinary actions without following due procedure as per Section 45(5) of the [Employment Act](#) against the employees in question, was a way used by the Respondent to frustrate the Claimant's dealings and a way to violate the employees' rights under [the Constitution](#) to join and participate in the activities of a trade union.
37. The Claimant further submitted that it had recruited all 17 employees of the Respondent at the factory at the time it sought recognition from the Respondent on 16<sup>th</sup> March and 21<sup>st</sup> March 2023.
38. In the same vein, the Claimant posited that it has met the minimum threshold required for recognition. In this regard, it was the Claimant's contention that out of 29 employees, it has recruited 17 members which is 59% of the Respondent's unionisable employees, way above the minimum threshold required under Section 54(1) of the [Labour Relations Act](#).
39. Placing reliance on the case of [Chai Trading Co. Limited v Muli Mwanzia and 2 others Civil Appel No. 66 of 2017](#), the Claimant further posited that the payroll submitted by the Respondent is with respect to two entities, Thorlite Kenya and Thorlighting World. The Respondent's position was that the members of Thorlighting World are ineligible to join its membership as the said company is in the business of sales.
40. The Respondent on the other hand submitted that out of the 40 unionisable employees, the Claimant had only recruited 17 members, which was way below the 50 plus 1 member of its employees. In support of the Respondent's submissions, reference was made to the case of Kenya Chemical and Allied Workers Union v Base Titanium Ltd (2016) eKLR.
41. The Respondent further posited that the right of employees to join a trade union of choice is not a qualification not to take disciplinary action against rogue employees. That by failing to appear at the disciplinary hearings, the Claimant should not be allowed to claim victimization while its members were given reasonable notice and sufficient time to show cause why the Respondent should not terminate their services on account of gross misconduct. In support of its arguments, the Respondent placed reliance on the case of Banking Insurance and Finance Union (K) v Standard Chartered Bank of Kenya (2013) eKLR.
42. The Respondent further submitted that the Claimant has brought new facts of Thorlite Kenya and Thorlighting World being separate entities. In the Respondent's view, these are matters of evidence that should have been canvassed at the hearing stage and not at this juncture. To this end, the Court was urged to disregard the said facts.

## Analysis and Determination

43. I have considered the pleadings, the evidence tendered by both sides as well as the rival submissions and find the issues falling for determination as being: -
  - a. Whether there is a case of victimization and harassment of the Claimant's members by the Respondent on account of their membership to the Union;
  - b. Whether the Claimant Union has proved that it has attained the threshold for recognition under Section 54(1) of the [Labour Relations Act](#);



### **Victimization and harassment on account of union membership?**

44. It is the Claimant's case that following the recruitment of the Respondent's employees into its membership, the Respondent engaged in acts of victimization and harassment against the said employees.
45. The Respondent has refuted the Claimant's assertions and maintained that the disciplinary measures taken against the employees concerned were carried out without any malice or ill intention on its part.
46. From the record, the employees who were issued with notices to show cause were Alex Nungu Charles, Gideon Wesonga and Boniface Otieno Juma.
47. With respect to Gideon Wesonga he was issued with a notice to show cause dated 19<sup>th</sup> April 2023, in which he was alleged to have deserted duty from 25<sup>th</sup> March to 12<sup>th</sup> April 2023. As to Alex Nungu, it was alleged through the notice to show cause dated 19<sup>th</sup> April 2023 that he was absent from work without any lawful cause on 11<sup>th</sup> April 2023.
48. On the other hand, Boniface Otieno was alleged to have sent abusive and threatening messages to Beatrice Nyaga (Assistant Manager) on 15<sup>th</sup> April 2023.
49. It is notable that the alleged acts committed by all the three employees named above were in the month of April 2023 whereas the record bears that the Claimant Union forwarded the check-off forms with respect to the employees who had signed up for membership on 16<sup>th</sup> March 2023.
50. Therefore, the Claimant's assertions that the employees were subjected to disciplinary proceedings for alleged issues that had long occurred does not hold. Besides, it would be unfair and illogical for the employees to be issued with notices to show cause before any alleged act of misconduct.
51. In any event, the Claimant did not indicate let alone suggest that the said employees did not commit the infractions alleged. If anything, Mr. Muendo admitted during cross examination that he does not support what Boniface Otieno did.
52. Further to the foregoing, Section 44(4) (a) and (d) of the *Employment Act*, is unequivocal that absence from work without leave or lawful cause and use of abusive or insulting language, constitute grounds for summary dismissal.
53. As this court stated in its Ruling which was delivered on 27<sup>th</sup> September 2023, the right to associate and join a trade union should not be misconstrued as a through pass for employees to engage in any form of misconduct at the workplace.
54. By all means, membership to the Union was not a license for the Claimant's members to engage in the alleged acts of gross misconduct at the workplace.
55. Therefore, in spite of the fact that the employees in question had joined the Claimant's membership, they were at all times under obligation to abide by the rules and regulations of the Respondent and the *Employment Act*.
56. In light of the foregoing, the Claimant's assertions that the Respondent engaged in acts of victimization against employees who had joined its membership, was not substantiated.

Whether the Claimant has proved that it has attained the threshold for Recognition



57. It is the Claimant's case that it recruited all 17 of the Respondent's unionisable employees into its membership. According to the Claimant, the Respondent has 23 employees, 6 of whom are in management.
58. Opposing the Claimant's assertions, the Respondent avers that the Claimant has not met the threshold of simple majority to warrant the parties sign a recognition agreement. In this regard, the Respondent contends that it has 39 employees in its workforce while the Claimant only recruited 17 employees.
59. Section 54(1) of the *Labour Relations Act* provides as follows:
- 54(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.
60. It is thus clear under Section 54 (1) of the *Labour Relations Act* that recognition is earned by a trade union attaining the simple majority in terms of membership. In this regard, the computation of a simple majority at a particular point in time is an arithmetical calculation, based on the total number of the unionisable employees against the total number of unionisable employees registered by the Union.
61. In support of its case, the Respondent exhibited a list of what it termed as the employees in its workforce. In this regard, the list contains 42 employees, 3 of whom are categorized as being in management.
62. The Respondent further exhibited a copy of its payroll for the month of April 2023. Notably, the number of employees in the said payroll total 31. I say so noting that the second payroll exhibited by the Respondent relates to another entity called Thorlighting World. This is confirmed by the fact that the Respondent and the said Thorlighting World bear different Employer Personal Identification Numbers (PINs) from the Kenya Revenue Authority. Fundamentally, these are two different employers.
63. On this note, I must state that I do not agree with the Respondent's submissions that the Claimant's submissions to the effect that Thorlite Kenya and Thorlighting World are different entities constitute new facts that should have been pleaded at the hearing. I say so noting that it is the Respondent who exhibited the two payrolls for Thorlite Kenya and Thorlighting World. Therefore, this constitutes evidence that is on the court record and it would not be fair to lock out the Claimant from basing its submissions on the said evidence.
64. That said, it is therefore apparent that at the time the Claimant Union sought recognition on 21<sup>st</sup> March 2023, it had recruited 17 of the Respondent's employees into its membership against a unionisable workforce of 28. This is taking into account that 3 of the 31 employees were in management. By simple arithmetic, this translates to approximately 60% of the Respondent's unionisable employees.
65. It therefore follows that at the time, the Claimant had attained the legal threshold of simple majority to warrant recognition by the Respondent.
66. The Respondent has further argued that the contracts of 3 employees who were registered members of the Claimant had come to an end hence the number of the Claimant's membership had further gone down from 17 to 14. Notably, Mr. Muendo admitted this issue during cross-examination.
67. This being the case, it would mean that as the Claimant's membership was coming down to 14, the Respondent's unionisable workforce was also dropping from 28 to 25. Therefore, this number translates to 56% of the Respondent's unionisable employees.



68. In light of the foregoing, the Respondent's claims that the Claimant had not attained a simple majority fades.
69. From my analysis of the evidence on record, it is apparent that the Claimant Union has attained the legal threshold of simple majority as set out in Section 54 (1) of the Labour Relations Act to warrant recognition by the Respondent.

### Orders

70. In the end, the Court enters judgment in favour of the Claimant against the Respondent as follows:
- a. The Respondent be and is hereby ordered to enter into a recognition agreement with the Claimant Union within 30 days from the date of this judgment.
  - b. The Respondent to continue effecting union dues deductions from the Claimant's registered members and remitting the same to the Claimant's gazetted bank account, as per the Ruling delivered by this Court on 27th September 2023.
  - c. In view of the nature of this Claim, each party will bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Namasake

For the Respondent Mr. Achando

Court assistant Millicent

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 had 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.

**STELLA RUTTO**

**JUDGE**

