



**Kenya National Union of Nurses v Avenue Health Care Limited (Cause E577 of 2020) [2023] KEELRC 308 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 308 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E577 OF 2020  
MA ONYANGO, J  
FEBRUARY 10, 2023**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**AND**

**AVENUE HEALTH CARE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a trade union registered under the *Labour Relations Act* to represent nurses. The respondent is a private hospital registered and operating in Kenya.
2. During the year 2018, the claimant recruited nurses in the employment of the respondent. The claimant thereafter wrote to the respondent seeking recognition and deduction of union dues from the employees it had recruited.
3. Upon the failure of the respondent to comply, the claimant filed Cause No 675 of 2019 seeking *inter-alia*, the following orders;
  1. A declaratory order that, the claimant has the right to receive trade union dues from its members through deduction by the respondent.
  2. An order directing the respondent to pay from its own funds the amount of Kshs 640,500 being unremitted trade union dues for the months of May, 2018 to September, 2019 in respect of 77 members.
  3. An order directing the respondent to pay from its own funds the amount of Kshs 192,150 being unremitted Central Organization of Trade Unions contributions for the months of May, 2018 to September, 2019.
  4. An order directed the respondent is to pay the costs of this suit to the claimant.



5. Any other order that the honourable court may deem fit and just to grant to meet the ends of justice.
4. The suit was resolved by a consent dated November 25, 2019 wherein the parties agreed that the respondent would deduct and remit union dues from 67 employees whose names were stated in the consent. By letter dated December 16, 2019, the claimant forwarded the recognition agreement to the respondent for signature. The respondent declined and the claimant reported the instant dispute to the Cabinet Secretary for Labour and Social Services.
5. The dispute was never resolved during conciliation and was eventually filed through the instant suit.
6. In the memorandum of claim dated September 23, 2020, the claimant seeks the following reliefs:
  1. A declaratory order that the claimant has the right to be recognized by the respondent and collectively bargain for its members.
  2. An order directing the respondent to sign the recognition agreement with the claimant within 14 days of the judgment.
  3. Costs of the suit to be borne by the respondent.
  4. Any other order(s) that the honourable court may deem just and fit to grant to meet the ends of justice.
7. In the memorandum of claim, the claimant avers that it recruited 77 nurses from among the employees of the respondent which constituted more than a simple majority of the unionisable nurses in the employment of the respondent and was therefore entitled to recognition and that the respondent was in violation of article 41 of the Constitution and sections 4, 54 and 57 of the Labour Relations Act.
8. Together with the memorandum of claim, the claimant filed a notice of motion seeking the following orders:
  1. That this application be certified urgent and the same be heard *ex-parte* on priority basis and service of the same be dispensed with in the first instant.
  2. That an interim order be and is hereby issued restraining the respondent, any of its agents, assigns or representatives from victimizing, locking out, suspending, harassing and or intimidating its employees who are members of the applicant union pending the hearing and determination of this dispute.
  3. That this application and the main suit be merged and proceed by way of documentation as provided for under rule 21 of the Employment and Labour Relations Court Procedure Rules, 2010.
  4. That the honourable court be pleased to grant any other order that it may deem fit and just to grant to meet the ends of justice.
  5. That costs for this application be borne by the respondent.
9. The respondent filed a replying affidavit sworn on October 9, 2020 by Fridah Kanana Muriungi, the Human Resources Manager of the respondent in which she states that sometime in 2018, the claimant recruited 77 members which at the time comprised a simple majority of the unionisable nurses of the respondent.



10. The affidavit however states that out of the 77 nurses recruited 7 were in management, 14 had left the organization through natural attrition, 1 (one) was promoted to management and 17 had voluntarily resigned from membership of the union.
11. The affidavit further states that out of 155 nurses employed by the respondent, the claimant had only 41 members and did not qualify for recognition as it did not have a simple majority.
12. The respondent also filed a memorandum of response in which it reiterates the averments in the replying affidavit of Fridah Kanana Muriungi. It further states that the number of the members of the union had reduced further to 38 as at October 31, 2020 out of a total of 154 unionisable nurses.
13. The respondent further accuses the claimant of insensitivity for pressing for signing of recognition agreement during Covid-19 pandemic which according to the respondent was inappropriate and inconsiderate towards the respondent.
14. The suit was disposed of by way of written submissions. The parties filed and exchanged submissions.

### **Analysis and Determination**

15. The only issue arising for determination is whether the claimant is entitled to recognition by the respondent.
16. Section 54(1) of the *Labour Relations Act* provides as follows:
  - “(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.”
17. The respondent admits that at some point in 2018, the claimant had recruited a simple majority of unionisable nurses in its employment. It however states that 7 were in management, 14 left the organization, 1 (one) was promoted and 17 voluntarily resigned. That the claimant had only 41 members.
18. The respondent does not state when the numbers of the nurses recruited by the claimant reduced from 77 to 41 or 38 as alleged by the respondent.
19. The respondent did not adduce any evidence of resignations from the claimant’s membership. Section 48 (6), (7) and (8) of the *Labour Relations Act* provides;
  - “(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.”
20. Further, recognition is reckoned as at the date on which the union seeks recognition. It was therefore important that the respondent states the date when the claimant ceased to represent a simple majority of the unionisable nurses of the respondent.



21. Having admitted that the claimant at one point had recruited a majority of its unionisable nurses, it was critical for the respondent to prove that on the date the claimant sought recognition, it no longer had a majority.
22. From the documents attached to the claimant's further list of documents dated January 20, 2022, the claimant first sent to the respondent a copy of the recognition agreement by letter dated May 2, 2018. The letter was received by the respondent on May 3, 2018. The claimant later, on December 16, 2019, again sent to the respondent a copy of the recognition agreement and proposed a meeting to sign the same on December 27, 2019.
23. It is therefore not true that the recognition agreement was unilateral or that the claimant wanted the same to be signed during the Covid-19 pandemic as alleged by the respondent in both the replying affidavit and in the memorandum of response to the claim.
24. The averment that some signatures in the check off forms were forged is first made in the submissions and is unsupported by the alleged report of the forensic examiner referred to by the respondent at paragraph 16 of its submissions. Submissions are not pleadings and a party cannot introduce new facts through submissions. Submissions can only expound or explain facts that have been pleaded.
25. The averment that there is another union, Kudhehia, seeking to recruit the same employees is also contained in the submissions and unsupported by any evidence of such recruitment.

### **Conclusion**

26. From the foregoing, I find that the respondent having admitted that the claimant at one point had recruited a majority of unionisable nurses in the employment of the respondent, has failed to prove that there was no simple majority as at December 16, 2019 when the claimant sought recognition.
27. I however, do not find any proof by the claimant that the respondent violated article 41 or sections 4, 54 and 57 of the *Labour Relations Act*.
28. For the foregoing reasons, I make the following orders:
  1. I declare that the claimant has a right to be recognized by the respondent for purposes of collective bargaining on behalf of unionisable nurses in the employment of the respondent.
  2. The respondent is directed to sign a recognition agreement with the claimant within 14 days.
  3. Each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MAUREEN ONYANGO**

**JUDGE**

