



**Kenya National Union of Services Employees v Kamongo Waste Paper (K) Ltd & another
(Cause E298 of 2021) [2023] KEELRC 278 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 278 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E298 OF 2021
AN MWAURE, J
FEBRUARY 7, 2023**

BETWEEN

KENYA NATIONAL UNION OF SERVICES EMPLOYEES CLAIMANT

AND

KAMONGO WASTE PAPER (K) LTD 1ST RESPONDENT

RETAIL MANAGEMENT SOLUTIONS 2ND RESPONDENT

JUDGMENT

1. The claimants filed the amended memorandum of claim dated April 27, April 2021 alleging unlawful transfer of services of the employees to an outsourcing company without benefits and reducing the terms of employment from permanent to one-year term.

Claimant's Case

2. The claimants say that the claimant union has organised and recruited the 1st respondent employees and forwarded its form 'S' for purposes of deductions of union dues as well as a recognition agreement, whereas the 1st respondent upon receiving union's request to commence deductions of union dues wrote to the claimant informing it that its management was verifying the authenticity of the names in the claimants check off form as well as the signatures appended but never commented on the issue of recognition agreement.
3. The claimants state that on March 9, 2021 the union wrote to the 1st respondent requesting to know the fate of its 132 recruited employees it forwarded to the 1st respondent for possible deduction and remittances as a means of follow up of its letter dated January 12, 2021.
4. The claimant further say that on March 10, 2021 they served another check off forms of 24 additional employees and requested the 1st respondent to deduct and remit dues to the union. The claimants say



that on March 26, 2021, the 1st respondent wrote to the claimant union confirming acknowledgement of the claimant's letter dated March 10, 2021 receiving check off for 24 employees.

5. The claimant aver that once again they did a reminder on March 31, 2021 on all check offs served on the 1st respondent which the respondent had not implemented deductions as required by the law. It is averred that on the same date by midday the claimant union realised that the 1st respondent was transferring the employees who are its members to an individual outsourcing company. The respondent wrote to the claimant disputing the existence of the claimant and relationship with the claimant.
6. The claimant further states that the 1st respondent surprised the workers who are members when they pinned on its notice board an undated memo requiring the employees to sign new contracts with new employer and or contractor known as Retail Management Solutions before leaving for the April long holidays. This was on March 31, 2021.
7. Claimant say that by then some of the employees had already been coerced to sign the already prepared letters of resignations attached with a letter of contract dated March 31, 2021 entitled 'Retail Management Solutions' which changed the terms of employment from permanent to contractual terms of 12 months. The claimant stated that the action and or inaction by the respondent was frivolous and unlawful as the same was a blatant violation of employees' constitutional rights thereby defrauding employees their lawful benefits under the law and the constitution.
8. The claimant prays for an award against the Respondent for:
 - a. A declaration that the action and inaction by the 1st Respondent is unlawful and a violation of the law and the constitution.
 - b. An order quashing all the resolutions and decisions made by the Respondents as a result of refusing to deduct trade union dues and outsourcing the workers hence *status squo* as before.
 - c. An order compelling the Respondent to pay the employees all their benefits entitled to them including underpayments from the time each one of them were employed as per redundancy sections 40 and 49 of the [Employment Act](#) 2007 to date in case the 2nd Respondent hold itself as the caretaker/new employer of the employees and or if the court finds that the exchange of hands between the 1st and 2nd Respondent was legal the terms which were in place at the 1st Respondent and the liabilities to remain in force and or unchanged.
 - d. The honourable court be pleased to issue an interlocutory order compelling the 1st Respondent to deduct and pay to the claimant union, the dues @ Ksh 250 per employee whose names appears in the checks-offs which were presented to the 1st Respondent by the claimant union.
 - e. An order compelling the 1st Respondent to issue certificate of service to each employee
 - f. Costs of the claim be provided for.
 - g. Interests on (c) and (d) above at court rates from the date of filing of suit till payment in full.

Respondent's Case

9. The 1st Respondent in the response to the amended memorandum undated says that the prayers sought have since been overtaken by events as the employees whom the claimant purport to represent are already serving the 1st Respondent under the outsourcing agreement with the 2nd Respondent.



The said former employees are currently employed by the 2nd Respondent under similar terms with similar benefits.

Claimant's Submissions

10. The Respondent avers he is a stranger therefore of allegations of unfair labour practices and claim of redundancy.
11. The claimant submits that it properly forwarded check off forms duly signed and containing a total of 132 members recruited from 1st Respondent workforce alongside a model recognition agreement which were received by the Respondent. That the actions of the Respondent and in conspiracy with the 2nd Respondent amounts to bad labour practice pursuant to section 82 of the *Labour Relations Act*, 2007.
12. The claimant further submits that the resignations of their members were as a result of coercion to join the 2nd Respondent to avoid being members of the union as these purported resignations happened immediately after parties had exchanged correspondences and in readiness to sign the recognition agreement. They submit that the employees could not have been expected to resign in large numbers as was the case then join the 2nd Respondent.

1st Respondent's Submissions

13. The 1st Respondent submits that even as at now, the claimant has failed to prove and demonstrate before the honourable court of the existence of any recognition agreement or a collective bargaining agreement between the 1st Respondent and the claimant and has also failed to adduce evidence in support of the claim.
14. What the claimant has produced as a collective bargaining agreement is an unexecuted agreement relative to recognition and negotiating procedure which does not comply with the requirements on signing under section 59(4) and (5) of the *Labour Relations Act*.
15. The 1st Respondent also submits that the claimant has not proved that it recruited a simple majority of its unionisable staff as required by section 54 (1) of the *Labour Relations Act* to warrant recognition. The 1st Respondent further submitted that the absence of employer- employee relationship between the 1st Respondent and the employees in question owing to the outsourcing, the 1st Respondent was not properly placed to engage the claimant, recognize the claimant union or deduct and remit union dues. The 2nd respondent however did not file their memorandum of response.
16. The Respondent also says that the court has determined that as at the date of the claimant's application, 306 out of 308 employees had already executed letters voluntarily resigning from the 1st Respondent's employment and all 306 of them signed new contracts with the 2nd Respondent. The Respondent accordingly submits that none of the 1st Respondent's former employees were rendered redundant or otherwise left as a result of this transition. The Respondent urged that the claim be dismissed with costs.

Decision

17. This same honourable court was presented with the claimant's application dated April 14, 2021 and ruling was delivered on May 19, 2022. As per the aforesaid ruling the prayers therein are verbatim the prayers in the amended memorandum of claim dated April 27, 2021.
18. Prayer (a) is declaration that the action or inaction by the 1st respondent is unlawful and violation of law and the constitution. This prayer is closely tied to prayer (c).



19. This court already pronounced itself on the fact that the grievants were not declared redundant by the respondent but rather 306 of the 308 employees of them willingly resigned from the 1st respondent's employment and took up new employment with the second respondent. None of them brought any complaints that they were forced to resign or to join the new organisation that is 2nd respondent. The court therefore finds the prayers for compensation on basis of being underpaid or declared redundant unprocedurally does not hold any weight and so is dismissed.
20. The claimant's allegation that the letters of resignation signed by their members were authorized and forced on them by the respondent and yet none of the members brought such a complaint. They have been working for the 2nd respondent since April 2021.
21. Furthermore the court cannot order that the respondents deduct union dues equivalent to the number of employees since the ruling of this court of May 19, 2022 the court held that there was no collective bargaining agreement between the claimants and the respondents. The claimants had an opportunity to pursue the registration of CBA. Since then nothing has changed and even if anything has changed the court has not been advised. So that prayer is also not supported by any tangible evidence and so is also not granted.
22. The claimant has also prayed that if court finds the exchange of hands between 1st and 2nd respondent was legal the terms which were in place at the 1st respondent and the liabilities to remain in force unchanged. The court has not been presented with a collective bargaining agreement between the claimant and the first respondent nor any contracts of the claimants with the respective employees that is the 1st and 2nd respondent in order to make comparisons and make orders as prayed. In that case there is no basis in which there would be a transfer of benefits from 1st respondent to the 2nd respondent.
23. The court furthermore has no records to show the relationships of the 1st respondent to the 2nd respondent. Indeed the 2nd respondent is described as an outsourced company that took over the employees of the 1st respondent who voluntarily conceded to sign contracts with the 2nd respondent. The court finds equally this prayer is not tenable and so is dismissed as well.
24. Flowing from above the court finds the claimant has not proved its case and the prayers contained in the amended memorandum of claim dated April 27, 2021. The said claim is therefore dismissed and each party is ordered to meet its costs.
25. Where applicable the members to be issued with their certificates of service upon the time of their resignation by the 1st respondent within 30 days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2023.

ANNA N. MWAURE

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 15th March 2020 and subsequent directions of 21st 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.

ANNA N. MWAURE

JUDGE

