



**Kenya National Private Security Workers Union v Fargo Courier Limited
(Cause 789 of 2016) [2023] KEELRC 265 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 789 OF 2016
SC RUTTO, J
FEBRUARY 3, 2023**

**BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT
AND
FARGO COURIER LIMITED RESPONDENT**

JUDGMENT

1. By way of a claim dated May 6, 2016, the claimant moved this Court seeking the following orders and declarations:
 - a. That the respondent do deduct and remit union dues from the date the check off forms were signed by the unionisable members in accordance with section 48 of the [Labour Relations Act](#).
 - b. That the union dues deducted to be deposited in the claimant's gazetted account.
 - c. That the respondent be ordered not to intimidate, victimize, harass and or sack any worker involved in the union activity.
 - d. The Court do direct and order the respondent to allow workers to be organized, engaged in union activities of their choice.
 - e. The respondent to meet the costs of the cause.
2. The claimant which describes itself as a duly registered trade union, avers that it is mandated to represent the industrial interests of employees engaged and employed in the private security industry. It is the claimant's case that employees working for the respondent voluntarily joined its membership on diverse dates starting from 2015. That consequently, it sent the duly signed check off forms to the respondent to effect deductions. That upon receiving the check off forms, the respondent victimized, harassed and intimidated its employees who were involved in union activities during the exercise and thereafter.



3. The claim was opposed through the respondent's Response to Memorandum of Claim dated May 23, 2016. The respondent has denied being a security service provider or being registered to provide such services as alleged by the claimant. It avers that it carries on the business of a courier service provider.
4. The respondent has termed the membership recruitment by the claimant as void *ab initio* as it is in breach of clause 3(a) of its constitution which only allows it to recruit persons employed in any private security service, warders, rangers, private guards, private security officers, VIP guards and bouncers. That the employees of the respondent do not fall in any of the stated categories. That gazette notice No 10615 only concerns employees who are providers of security services or whose employees are eligible to be members of the claimant. Consequently, the respondent has asked the Court to dismiss the suit with costs.
5. The respondent further filed a Notice of Preliminary Objection dated July 19, 2022 on the following grounds:
 1. The suit and the Application herein are premature as the steps of conciliation provided for under section 62 of the [Labour Relations Act, 2007](#) have neither been adhered to nor exhausted.
 2. This Honourable court therefore has no jurisdiction to hear this suit and it is for dismissal with costs to the respondent.
6. On July 20, 2022, the Court directed that the preliminary objection will be canvassed through the parties' submissions following full hearing.
7. During the trial which proceeded on July 20, 2022, each side called oral evidence.

Claimant's Case

8. The claimant called oral evidence through Mr Patrick Ndera and Mr Isaac Andabwa who testified as CW1 and CW2 respectively. Mr Ndera was the first to go. He told Court that he is employed by the respondent in the capacity of a service delivery coordinator and is also the chief shop steward. At the outset, he adopted his witness statement to constitute his evidence in chief and produced the documents filed by the claimant as exhibits before Court.
9. Mr Ndera's testimony was that he has worked for the respondent for the past 10 years. That he joined the claimant union in 2016 and his union dues were being deducted and remitted to the said union. That in 2018, the respondent stopped remitting the union dues to the claimant and started remitting the same to the Communication Workers Union (CWU). That together with other employees, they raised a complaint to this effect, with the respondent's human resource manager. That they were not involved prior to the respondent deducting and remitting their union dues to CWU.
10. That the then Chief Shop Steward, Mr Bernard Injendi was summarily dismissed for actively participating in the claimant union's activities. That it was subsequent to Mr Injendi's exit that he was handpicked to replace him. That thereafter, the management unlawfully handpicked other shop stewards to represent the security guards.
11. Mr Ndera further stated that the CWU officials did not recognize their duties as the workers' representatives and have all along, dealt with the management directly. That all along, they were not aware that there was a recognition agreement between the CWU, the stakeholders and management as they were not allowed to participate in the same.
12. That on or about November 21, 2019, they were shocked to learn that a new CBA had been signed without involving the shop stewards. That they raised this issue with the respondent's human resource



office and the CWU and as a result, they were transferred from Nairobi to various offices. That specifically, he was called by one Mr Stanley Musyoki Mbai, the respondent's human resource manager, who verbally told him not to interfere with the CBA. That thereafter, he was transferred to Nanyuki branch where he works todate.

13. It was his further testimony that most security guards denied ever signing check offs in respect of the CWU and confirmed that their signatures were forged. That after realization of the forgery, most members raised the issue in writing with the respondent's human resource manager and the CWU.
14. Mr Andabwa who testified as CW2, described himself as the claimant's National General Secretary. Similarly, he started by adopting his witness statement to constitute his evidence in chief. He further produced the claimant's documents and supplementary documents as exhibits before Court.
15. It was his evidence that the claimant union has a relationship with the respondent and was duly remitting union dues for some time. That this changed when another union was introduced without their knowledge. That subsequently, the respondent diverted the claimant's union dues to the said union, being the CWU. That the respondent signed a document with the CWU purporting to represent the employees, without the involvement of the shop stewards.
16. It was Mr Andabwa's further testimony that the directors of the respondent and Wells Fargo Limited are the same. That the claimant recruited members from both the respondent and Wells Fargo Limited and one year down the line, the respondent dilly dallied, wavered and out rightly avoided effecting and remitting union dues to its gazetted account.
17. That on April 11, 2016, he personally went to the respondent's premises and sought dialogue but the human resource manager was harsh and refused to engage him. That he is reliably informed that the respondent targets and victimizes the unionisable employees for presenting their grievances and joining the union which is their constitutional right. Mr Andabwa maintained that workers are free to join a union of their choice.

Respondent's Case

18. The respondent called oral evidence through Mr Willis Ayieko – Onyango, who testified as RW1. He identified himself as its Human Resource Manager and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He also produced the documents and supplementary documents filed on behalf of the respondent as exhibits before Court.
19. It was Mr Ayieko's testimony that the respondent is registered as a courier company that moves goods from one place to another and is regulated by the Communications Authority of Kenya.
20. That the respondent has not been registered and licensed as a security service provider and does not provide any security services. That none of the respondent's employees including the ones purported to be listed in the check off forms filed by the claimant is employed as a warder, ranger, private guard, private security officer, VIP guard or bouncer. That the respondent is currently a party to a CBA with the CWU, the union mandated to recruit members from among its employees. That the said CBA was duly registered on January 29, 2020 and pursuant to its conclusion, the Cabinet Secretary for Labour and Social Protection approved deduction of agency fees and remittance of the same to the CWU.
21. That further, there is no evidence that any of the respondent's employees ever applied for membership to the claimant union in writing. That there is also no evidence that the claimant's NEC deliberated on the applications by the said employees and their eligibility for union membership.



22. He further disputed the claimant's assertion that the respondent was invited for conciliation before the filing of the instant suit. That in this regard, the claimant failed to follow the mandatory procedure for disputes such as this, by referring the dispute for conciliation before filing the suit.
23. Mr Ayieko further denied the claimant's assertions that the respondent has victimized or harassed its employees on account of joining the union and that any termination that it has undertaken, was pursuant to the law.

Submissions

24. It was submitted on the part of the claimant that the respondent's employees joined its membership willingly and its action of forcefully removing members from its union to a different union resulted to intimidation, victimization, harassment or otherwise dismissing and transferring unionisable employees whose names appeared on the checklist. That as a result of these actions, several unionisable employees were forcefully transferred and others terminated from employment forcing them to seek redress in Court. It was further argued that Article 41(2) of the [Constitution](#) gives every worker right to form, join or participate in the activities and programmes of a trade union.
25. That further, employees enjoy unfettered rights to join a union of their choice. Placing reliance on the provisions of section 48 of the [Labour Relations Act](#), the claimant submitted that deduction of union dues purely depends on the authority to deduct from members having signed the check off forms. That there is no reason why the respondent would refuse to deduct and remit the union dues as per the signed check off forms.
26. With regards to conciliation, the claimant submitted that the word used under section 62 of the [Labour Relations Act](#) is "may" hence it is not mandatory to report the dispute to the Ministry of Labour. That under section 74, referral of recognition disputes has not made it mandatory for referral of disputes for conciliation.
27. In support of its submissions, the claimant placed reliance on the case of [KUDHEIHA Workers Union vs AgaKhan University Hospital](#) (2015) eKLR.
28. On its part, the respondent submitted that failure by the claimant to refer the dispute for conciliation before filing the same in Court, causes the claim to be fatally defective and is for striking out. In support of its argument, the respondent relied on the case of [Robert Njeru Ndatbo vs Inspector General of Police & 2 others](#) (2018) eKLR.
29. It was further submitted on behalf of the respondent that the claimant did not produce evidence to demonstrate that it is a registered security service provider. That the claimant did not plead that it was entitled to recruit from among employees of courier firms on the basis of its new constitution registered in 2021. That as such, the claimant is bound by its pleadings and cannot deviate from them and present evidence inconsistent with the pleadings. The case of [Joshua Mungai Mulango & another vs Jeremiah Kiarie Mukoma](#) (2015) eKLR was cited in support of this position.
30. That even though the shareholding in Fargo Courier Ltd (respondent) and Wells Fargo Ltd (a security company) are similar, they are separate and distinct companies being run separately from different headquarters and were incorporated at different times. To buttress this argument, the case of [Charles Roy Makuto vs Almakony Limited & another](#) (2016) was cited.
31. That assuming that the payments exhibited by the claimant constituted union dues, they cannot confer on it a right which is not provided for under the [Constitution](#) or the [Labour Relations Act](#). To this end, it placed reliance on the case of [Standard Chartered Bank vs Intercom Services Limited & 4 others](#).



32. It was the respondent's further argument, that the claimant's 2016 constitution did not include references to "courier service providers run and managed by security service providers". That the check off forms exhibited by the claimant are in respect of 2017, 2018 and 2020 hence the constitution applicable at the time of the purported recruitments, is the one for 2016. That the recruitments therefore offended the said constitution. For emphasis, the case of *Kenya Plantation and Agricultural Workers Union vs Kenya Chemical and Allied Workers Union & 2 Others* (2018) eKLR was cited. That further, the purported resignation letters exhibited by the claimant do not meet the standard under section 48 of the *Labour Relations Act*. This argument was supported by the case of *Kenya National Union of Nurses vs Kenyatta National Hospital Board & 21 Others* (2018) eKLR.
33. With regards to the allegations of harassment and victimization of the respondent's employees who had joined the claimant union, it was submitted that the claimant did not lead any credible evidence to demonstrate this fact.

Analysis and determination

34. 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 the claimant has moved the Court prematurely in light of section 62 of the *Labour Relations Act*;
 - b. Whether the respondent should deduct and remit union dues from its employees who have expressed willingness to join the claimant union; and
 - c. Whether there is a case of harassment, intimidation and or victimization of the respondent's employees on account of their membership to the claimant union.

Whether the claimant has moved the Court prematurely in light of section 62 of the *Labour Relations Act*

35. As stated before, this issue was raised through the respondent's Notice of Preliminary Objection dated July 19, 2022. The respondent contends that the suit and the Application are premature as the steps of conciliation provided for under section 62 of the *Labour Relations Act, 2007* have neither been adhered to nor exhausted.
36. Section 62 of the *Labour Relations Act*, provides as follows:

"(1) A trade dispute may be reported to the Minister in the prescribed form and manner...."

37. Evidently, the manner in which the said provision is couched, reveals that it is not mandatory requirement to refer a trade dispute to the Minister prior to a party moving the Court. Therefore, a party is at liberty to seek the Court's legal intervention without referring the dispute for conciliation. More importantly, it is worth noting that the aforesaid section 62 does not in any way diminish or oust this Court's jurisdiction which is anchored under Article 162 (2) (a) of the *Constitution*. On this issue, I echo the sentiments of the Court in the case of *Kenya County Government Workers Union vs Nakuru County Government & another* [2018] eKLR where it was held that:

"25. The provisions are not mandatory. The reporting of the trade dispute to the Minister though not mandatory is a best practice in terms of addressing



matters between employers and trade unions on the shop floor where the best evidence can be sourced.

26. Section 62 of the Act thus couched does not remove the original jurisdiction of the court from addressing any dispute filed by the parties and in this case a trade union with regards to matters set out in the Memorandum of Claim. The jurisdiction conferred upon the court under article 162(2) of the Constitution, 2010 does not abet even where parties file complaints with the Minister in terms of section 62 of the Labour Relations Act, 2007.”
38. Therefore, it is my finding that the claimant was well within its right to move the Court without referring the dispute for conciliation under section 62 of the *Labour Relations Act*. To this extent, the respondent’s Preliminary Objection is overruled.

Deduction and remittance of union dues

39. The bone of contention in this case is deduction and remittance of union dues from the respondent’s employees to the claimant union. It is the claimant’s case that it recruited members from the respondent’s workforce and forwarded check off forms to the respondent for purposes of deduction and remittance of union dues. The claimant further stated that the respondent refused to effect deduction and remittance of union dues from its employees who had signed the said check off forms. To this end, it exhibited check off forms in respect of employees who it alleged, had agreed to join its membership.
40. On the other hand, the respondent contends that any such recruitment by the claimant is null and void as clause 3 of its constitution only allows it to recruit persons employed in any private security service, warders, rangers, private guards, VIP guards and bouncers. That none of its employees purported to be recruited by the claimant fell into that category given that it is a courier firm and is not registered as a security service provider.
41. In support of its assertions, the respondent exhibited an extract of what it described as the claimant’s constitution and which provides as follows under Rule 3 (a) (ii) on Eligibility:
- “Any person employed in any capacity and in any ordinary office or post in any private security service, warders and rangers who is, or abo e, 18 years of age as a private guards/ private security officer/ VIP guards, bouncers.”
42. In light of the foregoing, the first question that needs to be answered is whether the respondent’s employees were entitled to join the claimant’s membership.
43. As stated herein, the claimant exhibited copies of check off forms which contained names of the respondent’s employees who it says had expressed their desire to join its membership. As it is, no evidence was exhibited contradicting the willingness of the respondent’s employees to join the claimant union.
44. The *Constitution* and the *Labour Relations Act* acknowledges and guarantees freedom of association, which includes the right of an employee to belong, or not belong to a trade union.



45. In this regard, the right to form, join or participate in the activities and programmes of a trade union is guaranteed under Article 41(2)(c) of the Constitution. Connected to this, Article 36 of the Constitution guarantees freedom of association in the following manner:

- “(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
- (2) A person shall not be compelled to join an association of any kind.
- (3) Any legislation that requires registration of an association of any kind shall provide that--
 - (a) registration may not be withheld or withdrawn unreasonably; and
 - (b) there shall be a right to have a fair hearing before a registration is cancelled.”

46. Section 4 (1) of the Labour Relations Act is one of the ways through which the above Constitutional provisions have been given effect.

47. Therefore, the respondent has no right to dictate the membership of the union which its employees may join. It is their cardinal right to determine their union of choice. It matters not whether it is the relevant trade union in that sector. What matters is the employee’s freedom and right to associate and unionize as guaranteed by the Constitution.

48. Therefore, notwithstanding, the scope of the claimant’s constitution in 2016, the recognition agreement as well as the respondent’s CBA with the CWU, the employees of the respondent were well within their constitutional rights under Articles 36 & 41(2)(c), to join the claimant union. As such, the respondent has no basis to interfere with that constitutional right and it ought to respect its employees’ constitutional right to associate, join and participate in the activities of a trade union of their choice.

49. Concluding on this issue, I wish to reiterate the sentiments expressed by the Court in the case of Amalgamated Union of Kenya Metal Workers vs Dock Workers Union & another [2019] eKLR, thus:

- “12. It is therefore not a substantive point of law, for the 2nd Respondent, to posit that the 1st Respondent is not the relevant Trade Union to represent Employees in the motor trade group. Recent decisions from the Courts have tended to overlook industrial trade unionism, in favour of freedom of association. Realities on the ground have shown that the principle of ‘one industry, one trade union’ is no longer workable.”

50. That said, I now turn to the issue of deduction and remittance of union dues. On the strength of the exhibited check off forms, the claimant has sought to compel the respondent to deduct and remit union dues from the said employees to its gazetted account.

51. Payment of union dues by members, is an obligation that goes hand in hand with the right to join a trade union. Section 48(2) and (3) of Labour Relations Act provides that: -

- “(2) A trade union may, in the prescribed form, request the Minister 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 Minister 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."

- 52. To this end, once an employee is recruited to a union and signs a check off form, an employer is required to commence deduction and remittance of union dues for the recruited employee within 30 days of being served with the said check off forms.
- 53. It is also notable that the claimant averred that the respondent was deducting and remitting union dues from its employees until the CWU came into the picture. This assertion was not disputed by the respondent. To this end, the claimant exhibited a bank statement indicating a credit from the respondent. Its only contention was that the claimant has no mandate to recruit members from its workforce.
- 54. As I have stated herein, there is no evidence that the respondent's employees who had joined the claimant's union had expressly denounced membership. There was therefore no justification for it to halt further deductions and remittance of their dues to the claimant union.
- 55. It should be further be noted that section 48(3), is in mandatory terms hence it is not upto the employer to elect whether to comply.
- 56. Accordingly, the respondent is mandated to effect deductions of union dues from the claimant's members and remit the same to the claimant's gazetted bank account.

Whether there is a case of harassment, intimidation and or victimization of the respondent's employees on account of their membership to the claimant union.

- 57. The claimant further alleges that upon receiving the check off forms, the respondent harassed, intimidated and victimized its employees who had joined its membership. It was CW1's testimony that he was transferred from Nairobi to Nanyuki as a result of his membership to the claimant union. He further stated that the former chief shop steward, who was his predecessor, was terminated on account of his union membership. On its part, the respondent denied victimizing and harassing the claimant's members and maintained that any termination from employment was procedurally undertaken.
- 58. In support of its claim, the claimant exhibited a copy of a Court order in respect of ELRC Cause no 888 of 2018; Kenya National Private Security Workers Union vs Wells Fargo security limited, Fargo Courier limited and Communication Workers Union of Kenya, in which the Court issued an interim injunction restraining the respondents from intimidating, victimizing and or unfairly terminating the shop stewards. The Court further stayed the suspension letters issued by the respondents to the shop stewards. Notably, the parties in that suit are common to the parties in the instant suit, save for Wells Fargo Security Limited and Communication Workers Union of Kenya.



59. Therefore, it is evident that the relationship between the parties herein has not been smooth sailing when it comes to the respondents' employee's membership to the claimant union. As such I do not find the claimant's allegations in respect of harassment, intimidation and victimization of its members in regards to their union membership, as being remote and farfetched.
60. As stated herein, Article 41 of the Constitution, guarantees the right to join a union and participate in the activities of such union. Consequently, harassment or victimization of an employee on account of their union membership is a direct violation and goes to the root of Article 41 and the constitutional right to associate. The right to associate and join a union of one's choice is an inviolable right that cannot be taken away.
61. I must emphasize that harassment, victimization and intimidation of employees on account of their membership to a union, is a grave matter and is to be frowned upon and should not be left to stand. In this regard, an employee who wishes to join a union should not be subjected to any form of harassment, victimization and intimidation.

Order

62. It is against this background that the Claim succeeds and the respondent is directed to:
- a. Deduct and remit to the Claimant's gazetted bank account, dues from its employees who have duly signed check off forms and acknowledged membership to the Claimant union.
 - b. Restrain from taking any action that may reasonably be construed as harassment, victimization and or intimidation of its employees on account of their union membership.
 - c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Applicant Ms. Wanyama

For the Respondent Mr. Omino

Court assistant Abdimalik Hussein

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 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.

