



Kenya Union of Commercial Food and Allied Workers v Builders Warehouse (Kenya) Limited (Cause E079 of 2023) [2023] KEELRC 794 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 794 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E079 OF 2023
M MBARÚ, J
MARCH 28, 2023

BETWEEN

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS CLAIMANT

AND

BUILDERS WAREHOUSE (KENYA) LIMITED RESPONDENT

RULING

1. The claimant filed application dated 6th February, 2023 seeking for orders that;
 - a. An order be issued restraining the respondent from terminating the services of any of the 119 employees targeted by the respondent for termination on account of redundancy.
 - b. Pending hearing and determination of this application, an order do issue restraining the respondent from any acts of victimisation against any of the 119 employees targeted for redundancy.
2. The application is supported by the affidavit of Caleb Nyamwaro and on the grounds that in November, 2022 the respondent's unionisable employees registered their membership with the claimant by signing check off forms which were forwarded to the respondent on 5th January, 2023 and on the same day placed a model Recognition Agreement to the respondent but has refused to execute the same. The respondent has commenced a process of summoning employees one by one to the office warning them against joining the claimant union and threatening them with action if they persist with their union membership.
3. The respondent has since refused to meet with the claimant to sign the Recognition Agreement and is now victimising union members contrary to the law.
4. Despite the respondent being granted time to reply to the application, there was no compliance.



5. Parties attended court and made oral submissions.
6. The claimant submitted that the union has served the respondent with check off forms but the respondent has refused to execute the same and has resulted in victimisation of unionisable employees with a view of having them resign from the union. The respondent has further denied the union access to its premises so as to engage its members and the orders sought are necessary to secure the rights of unionisable employees who have signed the check off forms and should have their rights to unionise and to engage in union activities protected by the court.
7. The respondent has now initiated the process of redundancy against the 119 unionisable employees to frustrate unionisation and hence the orders sought should issue.
8. In response, the respondent submitted that the claimant has no standing in these proceedings and the subject employees have since filed an affidavit directing the claimant to withdraw this suit.
9. there exists a similar suit ELRC No. E068 of 2023 relating to the same parties and issues which is before a different court and should be consolidated to avoid conflicting orders.
10. The respondent has not denied the claimant access to its premises as alleged and there is no evidence in this regard and the application should be dismissed with costs.

Determination

11. The instant application is supported by the Supporting Affidavit of Caleb Nyamwaro the Branch Secretary General at Ongata Rongai branch to support the application seeking for orders that the respondent be restrained from terminating the employment of 119 employees targeted on account of redundancy. The claimant has attached Notice dated 1st February, 2023 being Notice of Proposed Redundancy – Builders Warehouse Kenya.
12. The Notice of Proposed Redundancy is issued on the reasons that the respondent operates stores across a number of countries in Africa but has only one store in Kenya situated at Karen Waterfront in Nairobi and which opened in the year 2020 and since, the store has financially underperformed with losses increasing every year. there is accumulated loss of Ksh.454.3 million and the respondent has continued to underperform.
13. Matters of redundancy are regulated in law and the motions of which requires parties to be heard on the merits. To stop the process, whether justified or not at this stage would deny the court crucial evidence and material in response by the respondent.
14. Despite the respondent not filing any Replying Affidavit to the instant application, the orders sought by the claimant and the documents filed in support do not aid a case requiring the court to issue an injunction on the Notice of Proposed Redundancy at this stage.
15. Whether the claimant is recognised by the respondent or not, the motion of Section 40 of the [Employment Act](#), 2007 put into perspective in this case cannot be stopped to accommodate the process of recognition.
16. With regard to the standing of the claimant to urge the instant case, matters of recognition of a trade union by an employer and the capacity of such trade union to represent its members in court proceedings are regulated under Section 54 of the [Labour Relations Act](#), 2007.
17. Whereas a trade union seeking to negotiate a collective bargaining agreement (CBA) must first be recognised by the employer pursuant to Section 54 of the [Labour Relations Act](#), 2007 the same trade



can attend court and represent its members and does not require recognition and such rights is primary and secured under Section 22 of the *Employment and Labour Relations Court Act*, 2011 that;

54. Recognition of trade union by employer

- (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.

And

22. Representation before the Court

In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose.

18. The claimant having interests in the sector where the respondent is placed and having recruited members in its employment is with proper standing to file and attend before this court.
19. Based on the above, the orders sought in the interim shall not issue. Costs shall abide the outcome of the claim.
20. The respondent shall respond to the claim herein within 14 days from the date hereof and parties shall be allocated further dates at the registry.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

