



Kenya National Union of Nurses [KNUN] v National Industrial Bank (NIC) & 5 others (Cause 387 of 2018) [2023] KEELRC 796 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 796 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 387 OF 2018
M MBARÚ, J
MARCH 27, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES [KNUN] CLAIMANT

AND

NATIONAL INDUSTRIAL BANK (NIC) 1ST RESPONDENT

THE REGISTRAR OF TRADE UNION 2ND RESPONDENT

SIMON KIBII 3RD RESPONDENT

JOHN K BIY 4TH RESPONDENT

LUCY J TANUI 5TH RESPONDENT

ALICE YAHUMA 6TH RESPONDENT

JUDGMENT

1. The claimant filed the claim herein on April 9, 2018 and served the respondents. Only the 1st respondent entered appearance.
2. The claimant was directed to serve through substituted service. There was no appearance or attendance by the 2nd to 6th respondent.
3. Satisfied that all the respondents were aware of these proceedings, the court heard the claimant and the 1st respondent.

Claim

4. The claimant is a trade union registered under the provisions of the [Labour Relations Act](#), 2007 (the LRA). The 1st respondent is a financial institution regulated under the [Banking Act](#). The 2nd respondent is an office established under the [LRA](#). The 3rd, 5th and 6th respondents are employees of



Uasin Gishu Public Service Board designated as nurses, and the 4th respondent is a former employee of Uasin Gishu Public Service Board.

5. The claimant operates two bank accounts where all monies deducted from the ages of all its members should channelled being;

"Kenya national Union of Nurses Barclays Banks of Kenya Queensway Branch Nairobi
Account Number xxx

And;

Kenya National Union of Nurses Co-operative Bank

Aga Khan Walk

Account number xxx."

6. The claimant's constitution provides that all cheques should be banked in the unions account in accordance with Recognition Agreement signed between the claimant and all County Governments for check-offs system and should not be paid in cash or be paid into the branch account but to the national union account.
7. The claimant receives the remittances from the members for lawful undertakings well spelt out under the provisions of section 39 of the LRA.
8. The claimant noted that an unauthorised account receiving union monies being account No.xxx at the 1st respondent was fraudulently opened by the 3rd to 6th respondents and immediately wrote to the 1st respondent on 2nd January, 2018 so as to be supplied with instruments used to opening such an account, the signatories and that the account be frozen but there was no response.
9. The actions by the 1st respondent denied the claimant's members right to fair labour practices and failed to abide the provisions of section 48 of the LRA by refusing to pay monies deducted from members of the claimant to the claimant and the actions by the 1st, 3rd to 6th respondents were done fraudulently and in violation of the law.
10. The claimant is seeking the following;
- an order be issued freezing the account held by the 1st respondent being account No.xxx being operated from Eldoret branch;
 - an order quashing the instruments used in opening Bank account No.xxx at 1st respondent Eldoret branch;
 - a declaration that the 3rd to 6th respondent's action of opening Account No.xxx with the 1st respondent for the purpose of collecting claimant's members union dues is illegal and fraudulent;
 - An order be issued directing criminal investigations into the operations of the account and the employers/individuals who fraudulently diverted the union dues to the subject account No.xxx;
 - An order be issued directing the 1st respondent to transfer all monies in respect of account No.xxx into the claimant's gazetted and authorised accounts;



- f. An order be issued directed at employers who have channelled union dues into the account to pay the claimant as provided for under section 19(6) of the Employment Act and commence remittances to the authorised bank account;
 - g. Orders be issued that any person, firm or individual of any employer who by virtue of choice necessitated the fraudulent transactions in account No.xxx to pay the claimant compensation for economic damage at court rates;
 - h. An order be issued directing the 3rd to 6th respondent to tender an accurate account of the proceeds acquired from members in respect of account No.xxx and to immediately remit the same to the claimant's authorised bank account at Kenya National Union of Nurses, Barclays Bank of Kenya, Queensway Branch Nairobi, Account No.xxx; and
 - i. Payment of costs.
11. In evidence, the claimant called Seth Panyako the general secretary and who testified and reiterated the claim and that as the general secretary of the claimant, on 2nd January, 2018 upon discovery of union funds being deposited with the 1st respondent in account No.xxx he wrote and requested that the account be frozen and to get information as to who the signatories were. He discovered there were fraudulent remittances of claimant's member's union dues through the participation of the 3rd to the 6th respondents which is contrary to article 41 of the Constitution and the LRA.
 12. The deductions made by the employers from the wages of claimant's members were being unlawfully transacted in the bank account held by the 1st respondent without any justifiable cause. There was fraudulent diversion of money into an illegal account and unauthorised account operated by the 3rd to 6th respondents who are employees of Uasin Gishu County Public Service Board serving as nurses save for the 4th respondent who is a former national official of the claimant.

Response

13. In response, the 1st respondent's case is that in March, 2017 it received instructions from its customers the 3rd to 6th respondents to open a joint account No.xxx and who indicated that the account would be used to carry on a PSV business which was detailed in the account opening forms signed by all of them. At the time the account was opened, the 1st respondent carried out due diligence as required and at the time it was not indicated that the same was meant to be used to collect or deposit deductions from members of the claimant.
14. In opening account No.xxx the 1st respondent followed due diligence and is not party to any conspiracy to commit fraud for the reasons that the claimant did not disclose the members whose deductions have been remitted into this account. If there was fraud on the part of the 1st respondent as alleged, there was no call to address how the account was opened and the 1st respondent had acted in good faith and there is no cause of action against the 1st respondent since the account was opened regularly and all required documents to support the same were availed as required by law. The claimant is entitled to pursue the account holders as opposed to the 1st respondent. There is no case of fraud by the 1st respondent to justify the grant of orders sought by the claimant and the claim against the 1st respondent should be dismissed with costs.
15. In evidence, the 1st respondent called Ibrahim Ngatia the legal counsel who reiterated the response filed and testified that in March, 2017 the 3rd to 6th respondents issued instructions to the 1st respondent to open account No.xxx as a joint account for a PSV business as indicated in the account opening forms and the required documents with regard to opening a joint account were attached and verified



- by the 1st respondent to be correct. Due diligence conducted indicated that the source of funds for the account No.xxx was PSV activities and the account holders attached a KRA Pin, their identity cards and transacted different amounts.
16. At the close of the hearing, both parties filed written submissions.
 17. The claimant submitted that the 3rd to 6th respondent have previously undertaken fraudulent activities and opened an account at Eco Bank Kenya Limited and leading to the claimant filing *Kenya National Union of Teachers v Eco Bank Kenya Limited ^ 8 others* [2020] eKLR seeking similar orders as herein and judgment issued against them to refund monies irregularly remitted in that account relating to claimant's members union dues. In this case, despite these respondents being served herein, they failed to attend or challenge any part of the claimant and hence the orders sought should issue.
 18. The respondents have acted and gone contrary to section 47 of the LRA by misusing union funds and a complaint was lodged with the 2nd respondent and to secure such funds, the account No.xxx proceeds should be remitted to the claimant's account because the 3rd to 6th respondents have acted contrary to the law as held in *Nelson Onyango Otho & 5 others v Rashid Jumaa Nyale & another* [2014] eKLR. All union funds should be remitted to the authorised account pursuant to Section 39 of the LRA and the 1st respondent has special knowledge of the account in question and by its refusal to give evidence in this regard including a statement of the account and source of monies therein is questionable and meant to defeat justice as held in *Peter Wafula Juma & 2 others v Republic* [2014] eKLR and the orders sought should issue.
 19. The 1st respondent submitted that account No.xxx is operated from Eldoret branch and the allegations that the respondents conspired to open the same is without evidence since the 3rd to 4th respondents as customers opened the account jointly and due diligence indicated the same was meant for PSV business. There was no conspiracy as alleged and there is no evidence of such matter as held in *Central Bank Limited v Trust Bank Limited & 4 others* [1996] eKLR that where fraud is alleged the same must be strictly proved.
 20. The 1st respondent acted in good faith in the circumstances while opening account No.xxx and unlike the case cited of *Kenya National Union of Nurses v Eco Bank Limited & 8 others*, the respondents had opened an account designated as a branch account but the account No.xxx was indicated to be for a PSV business as the details attached to the response indicate.

Determination

21. The non-attendance of the 2nd, 3rd, 4th, 5th, and 6th respondents have denied this court crucial material evidence and records particularly, the 3rd to 6th respondents with knowledge of proceedings herein and being the account holders No.xxx held with the 1st respondent, non-attendance means the claims made against them are not challenged. The word of the claimant against them is correct.
22. The gist of Section 48(2) of the LRA is to ensure the lawful handing of all trade union dues collected by employers from employees who are members of a given trade union with whom the employer has a Recognition Agreement with and the Minister has published the authorised bank account to and in which all such trade union dues are to be remitted;
 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.

And Section 50(1) of the LRA directs in mandatory terms that;

(1) Any amount deducted in accordance with the provisions of this Part shall be paid into the designated trade union or employers' organisation account within ten days of the deduction being made.

23. What is crucial with regard to deduction and remittance of trade union dues is the conduct of a given employer pursuant to Section 50(8) of the LRA which directs an employer to deduct and remit union dues in accordance with the Minister's Notice and to the authorised account gazetted and stated in such notice;

8. No employer shall—

- i. fail to comply with an order or a notice issued under this Part;
- ii. deduct any money and not pay it into the account designated in the notice issued by the Minister; or
- iii. pay money into an account other than the account designated in the notice issued by the Minister.

24. The rationale for the above is to be found under Section 50(9) and (10) that no person should request an employer to deduct and remit trade union dues into any other account other than the account designated by the Minister and to do so, such a person commits an offence;

9. No person shall—

- i. request an employer to pay money deducted in accordance with this section into an account other than the account designated by the Minister in the notice; or
- ii. use any money deducted in accordance with this section for any purpose other than the lawful activities of a trade union or a trade union federation.

10. An employer or any person who contravenes the provisions of this section commits an offence.

25. The claimant enjoys recognition by Uasin Gishu County under which Uasin Gishu County Public Service Board is resident. With that recognition, for such party and employer or any other employer(s) in collusion with the 3rd to 6th respondents to remit claimant's members trade union dues from the designated account(s) into account No.xxx held by the 1st respondent is a serious breach of the law without justification and a serious breach of the law in complicity with the 3rd to 6th respondents to circumvent the clear provisions of Section 48 and 50 of the LRA. With recognition of the claimant, Uasin Gishu County Public Service Board or any other employer(s) under which the 3rd, 5th and 6th respondents are employees ought and should have acted within the confines of the law and not act to circumvent the law by colluding to defraud the claimant of trade union dues deducted from its members.

26. However, one crucial and important party/parties who ought and should have been enjoined in these proceedings for completeness is or are the employer(s) who with knowledge of the Order of the Minister under the provisions of Section 48 and 50 of the LRA colluded with the 3rd to 6th respondents and facilitated to the opening of account No.xxx with the 1st respondent and proceeded to remit



funds therein drawn from trade union dues deducted from the claimant's members and which the 1st respondent has failed to render an account.

27. Even where the 1st respondent opened an account as instructed by its clients/customers the 3rd to 6th respondents, served with instant proceedings and called upon to account, the 1st respondent in good faith should and ought to have filed the statement of such account.
28. The respondents thus having acted outside the law and leading to opening account No.xxx with the 1st respondent, the proceeds therein deposited from the date the account was opened to date shall all be taken and remitted to the authorised account of the claimant, being;

"Kenya national Union of Nurses Barclays Banks of Kenya Queensway Branch Nairobi
Account Number xxx"

29. This being the bank account published by the Minister with regard to the claimant receiving trade union dues from its members.
30. The 1st respondent shall also file with the court all the transactions/statements relating to this account to assist the claimant to identify the employers and persons who remitted such funds to such account and to allow the claimant to address the same as regards Section 50(10) of the LRA.
31. The 1st respondent upon undertaking the above shall be at liberty to maintain the account No.xxx for their clients/customers the 3rd to 6th respondents for the PSV business.
32. With regard to the remedy sought for the investigations against employers and individuals who colluded to transfer monies into account No.xxx held by the 1st respondent, upon receipt of the account statement(s) from the 1st respondent as above directed, the claimant shall be at liberty to initiate such investigations with the relevant government agencies.
33. Accordingly, judgment is hereby entered for the claimant against the respondents in the following terms;
 - a. An Order is hereby issued that all monies held in account No.xxx held by the 1st respondent from the date the account opened to date shall all be removed and remitted to the claimant through the following account;

Kenya national Union of Nurses Barclays Banks of Kenya Queensway Branch Nairobi
Account Number xxx
 - b. An Order is hereby issued directing the 1st respondent to remit to the claimant bank statement(s) with regard to account No.xxx from the date the account was opened to date to allow the claimant address pursuant to section 50(10) of the [Labour Relations Act, 2007](#); accordingly;
 - c. An Order is hereby issued that based on the findings (b) above with regard to any monies remitted to the account No.xxx and removed by the 3rd to 6th respondents and relating to trade union dues, the claimant shall be at liberty to pursue recovery of the same;
 - d. Costs of these proceedings for the claimant shall be met by the 3rd, 4th, 5th and 6th respondents jointly and or individually.
 - e. The 1st respondent shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.



M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

