



**Kenya Private Universities Workers Union v Kenya Highland University
(Cause 103 of 2016) [2023] KEELRC 713 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 103 OF 2016
HS WASILWA, J
MARCH 21, 2023**

**BETWEEN
KENYA PRIVATE UNIVERSITIES WORKERS UNION APPLICANT
AND
KENYA HIGHLAND UNIVERSITY RESPONDENT**

RULING

1. Before me for determination is the applicant's notice of motion dated December 2, 2022, filed under certificate of urgency on the December 6, 2022, pursuant to section 12(1), (2)& (3) of the [Employment and Labour Relations Court Act](#), No 20 of 2011 and all other enabling provisions of law, seeking the following orders;-
 1. Spent.
 2. This honourable Court do issue an order compelling the Respondent herein to continue with the CBA Negotiations, having signed a recognition agreement with the Applicant Union, by signing or furnishing their counter proposals to the Applicant Union after they were duly forwarded the proposals forming basis of the CBA.
 3. That this Honourable Court do issue a prohibitory order prohibiting the Respondent herein from victimizing and coercing member employees to withdraw from the Applicant Union and barring others from joining as is their right.
 4. That the Respondent herein bears the costs of this Application.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Mr Peter Emisembe Owiti, the General Secretary of the Applicant Union. The application is based on the following grounds; -



- a. That the applicant Union and the Respondent entered into a recognition agreement dated June 23, 2016.
- b. Sometimes in 2017, the applicant Union discussed with the Respondent the issue of underpayment of its members which was corrected and the Respondent paid according to the minimum wage Order.
- c. On September 25, 2019, the Applicant forwarded a draft CBA which was received by the Respondent on the September 27, 2019, for the purposes of negotiations and counter-proposal. Save for commuter allowance that was awarded, the Respondent did not give a counter-proposal on the CBA or agreed to the terms therein.
- d. The matter was held in abeyance until November 19, 2021, when the applicant forwarded once again the draft CBA for the Respondent's consideration and as a follow up, it requested for a meeting on December 6, 2021.
- e. The Respondent wrote back, asking for the meeting to be scheduled on January 19, 2022 at 11.00 am at the Respondent's board room which parties attended in the chairmanship of the Respondent's vice Chancellor.
- f. After the meeting, the vice chancellor, formed a committee that would forward their findings on the document to him. Also that the parties agreed for the Respondent to forward its counter-proposal by mid-February, 2022 and thereafter schedule a meeting to agree on the terms and sign the CBA by end of February, 2022.
- g. The parties also agreed for the Union to educate its members on CBA on the 18th February, 2022. The document was forwarded to all the Union members for their perusal and comments, which they all agreed on the terms and conditions of the CBA.
- h. It is stated the Respondent failed to submit its counter-proposal within the set timelines, forcing the Applicant to report a trade dispute to the ministry of Labour and Social Protection.
- i. The applicant states that after reporting the trade Dispute, the education meeting which was to be conducted with the Respondent's Employees was cancelled and the Respondent was no longer willing to discuss any issue regarding the CBA.
- j. The Respondent then embarked on threatening and coercing the Applicant's members to withdraw from the Union, in effect its charter representative, Madam Joyce withdrew from her position for fear of losing her job.
- k. The applicant contends that the actions of the Respondent was in violation of the employees right to fair labour practices as envisaged under Article 41 of the Constitution.
- l. The ministry of Labour and Social Protection appointed a conciliator from Kericho Labour office who invited parties for conciliatory meeting scheduled for March 23, 2022. In retaliation, the Respondent concerted its efforts of forcing the employees to withdraw from the Union.
- m. On March 23, 2022, the conciliator gave his recommendation for the Applicant to convene a meeting within 14 days to discuss the CBA. In compliance, the applicant wrote a letter dated March 30, 2022, inviting the Respondent to a meeting scheduled for April 13, 2022, but the Respondent did not attend the meeting. The Applicant officials decided to visit the Respondent's offices to discuss the issue which they had a sit down with the deputy vice chancellor, who agreed that parties should forge ahead and discuss the issue affecting the



employee but that nothing tangible was arrived at and in fact that the threats and the coercion continued.

- n. The applicant contends that the Respondent is adamant and has refused to heed to the call to discuss the terms in the CBA and thus urged this Court to allow the Application.
3. The Respondent opposed the application by filing a replying affidavit, deposed upon on the January 17, 2023 by Prof. Wilson Langat, the Respondent's Vice Chancellor.
4. The affiant state that the Applicant has not recruited a simple majority of employee and thus the CBA is untenable.
5. The deponent denied paying its employee under the minimum wage scale and avers that its infact one of the best employers in the region.
6. The affiant admitted to receiving a copy of the CBA and discussed it with the Applicant on January 19, 2022. The parties then agreed to have another meeting to discuss the contested issues before a counter proposal was made.
7. They denied threatening or coercing its employee but that after the draft CBA was forwarded to the Applicant's members, most of them resigned from the Union because the Applicant was coercing them to join the Union, failure to which they would negotiate for their salary reduction. That its on this basis that the Union members refused to attend the education day convened by the Applicant.
8. The Respondent avers that when it noted the numbers of the employees in the Applicant's Union were dwindling, it wrote the letter dated July 7, 2022 requesting to terminate and withdraw from the recognition agreement dated June 23, 2016 because the CBA would not be operationalized without a simple majority of employees in the Union. This letter did not receive any response as such the Respondent deemed it unopposed as of October 7, 2022.
9. The Respondent maintained that since the recognition agreement was withdrawn, there is nothing binding them with the Applicant that could have forced them to further negotiate the CBA and therefore the application before Court is an abuse of Court process which ought to be dismissed with costs.
10. In response to the replying affidavit, the applicant averred that it was initially forced to file a suit in Court which was allowed in 2016 and the Respondent compelled to deduct Union dues.
11. That the Respondent deducted Union dues after signing a recognition agreement and the parties agreed to delay the CBA because the number of students was low.
12. He admitted that the parties had a successful meeting on the 19th January, 2022 and at that time the Applicant's members were a simple majority and its only when the CBA was sent to the Respondent that it coerced and threatened its members that some withdrew from the Union and others resigned but that the total number of the said employees were not forwarded to them. He denied the allegation that the Union forced the employee to join the Union because all the unionisable employee had joined the Union way back in 2015.
13. The Applicant maintained that it is the Respondent that has coerced its members from withdrawing from the Union to paralyze the operation of the Union, informing the filling of this Application and suit herein. Therefore, that the allegation that the Union lack a simple majority is not true.
14. The Applicant urged this Court to direct the Respondent to give its counter proposal and push for the signing of the CBA.



15. Directions were taken for the application to be disposed of by written submission.

Applicant's Submissions.

16. The Applicant submitted that the Respondent has refused to continue negotiations and the signing of the CBA, when there is a Recognition Agreement. It was argued that the Union had an active recognition Agreement signed by the parties on the June 23, 2016 which is active to date and that there has neither been termination or cancelation of the same. In any case, that the allegation by the Respondent that it revoked the Recognition agreement is not plausible for the reason that the procedure for revocation under section 54(5) -(7) of the [Labour Relations Act, 2007](#) was not followed. To support this argument, the Claimant relied on the case of [Amalgamated Union of Kenya Metal Workers v Jaykay Mechanical Engineering Limited](#) [2019] eKLR where the court held;-

“The respondent must honour the terms of Recognition Agreement, and Section 54 of the [Labour Relations Act](#). Recognition is granted for purposes of collective bargaining. Parties cannot regurgitate recognition dispute, barely 2 years after signing the Recognition Agreement, and after another dispute was resolved by the Court leading to that Agreement. Judicial work should not be cyclic, where disputes are resolved, only for unsatisfied Parties to endlessly resurrect them, by devious means. It is meaningless for Employees to disown the Union after recognition was granted. Recognition can only undone, through section 54 [6] of the [Labour Relations Act](#); or through the terms of the Agreement itself; or through an order of the court.”

17. It was further argued that the decline of membership of employees from the union does not affect recognition because membership is only considered at the stage of recognition for the purposes of setting up a CBA. He added that until the employer applies for the Union to be de-recognized under the law, the recognition remain valid. To support this argument, the Claimant relied on the case of [Amalgamated Union of Kenya Metal Workers](#) (*supra*) where the Court held that;-

“It does not make sense to execute Recognition today, and tomorrow an Employer requires the Union to show again that it has a simple majority of Unionisable Employees, in order for collective bargaining to commence. The sanctity of the Recognition Agreement must be upheld. Although it is said that recruitment of Employees by the Union is a continuous process, nowhere does the law require the Union to show it has a simple majority at every turn in the collective bargaining cycle. The Court takes a grim view of Employers who conclude Recognition Agreements and fail to register even a single CBA. What is the purpose of recognition? If the Respondent wants to opt out, the law requires the Respondent does so through the National Labour Board; or through the mechanisms provided for in the Recognition Agreement itself; or through an order of the Court.”

18. It was submitted that the Union is empowered under Article 41 of the [Constitution](#) to enter into a collective Bargaining Agreement, while Section 57(1) of the [Labour Relations Act](#), mandates the employer that has a recognition Agreement to conclude the Collective Bargaining Agreement.

19. Accordingly, it was submitted that since there is an active Recognition agreement which the employer has not legally revoked, the Employer should be compelled by this Court to proceed with negotiation with the bid of signing the CBA.

20. On whether the Respondent has threatened the Applicant's members, it was submitted that the Respondent has resulted to coercing, victimizing and threatened the Applicant's members to force



them to withdraw from the Union in order to paralyze the activities of the Union and in effect deny the Applicant's members their freedom of association and right to fair labour practices provided for under Articles 36 and 41 of the Constitution. To emphasize on this, they relied on the case of Bakery, Confectionery, Food Manufacturing & Allied Workers Union v Mill Bakers Limited; Real Careers Limited (Interested Party) (Cause 1193 of 2018) [2022] KEELRC 1422 (KLR) (27 May 2022) (Judgment) where the Court held that; -

“Some businesses which have not fully embraced trade unionism, employ all manner of tactics, to ensure trade union activities are kept at bay in the workplace, and that the structures of collective bargaining are stymied. Martin Jay Levitt, a reformed Union Buster, in his book, Confessions of a Union Buster, New York Crown Publishers, 1993, gives some insights to the dirty tricks employed by Union Busters, dirty tricks which elevated him to the top of his profession. He describes how Union Busters wear down Trade Unions, and are contemptuous of Workers who try to organize. They are masters of corporate skulduggery; whose best ware is to intimidate Workers against unionization. Levitt describes trade union busting, as ‘ a field populated by bullies and built on deceit. A campaign against a Union, is an assault on individuals and a war on truth. As such, it is a war without honour. The only way to bust a Union is to lie distort, manipulate, threaten and always, always attack.’”

21. In conclusion, the Applicant urged this Court to allow its application as prayed.

Respondent's Submissions.

22. The Respondent submitted on two issues; whether the recognition Agreement dated 23rd June, 2016 could be terminated by either party to the agreement and whether there was any coercion, threats and victimization or any interference of the Applicant's members to join and or resign from the Union.

23. On the first issue, the Respondent submitted that parties are bound by the terms of their agreement as was held in National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503 [2011] eKLR which Court authoritatively cite in the case of South Nyanza Sugar Co. Ltd v Leonard O. Arera [2020] eKLR where the Court held that; -

“It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows:

-A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

24. They also cited the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR where the Court of Appeal further stated that:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”



25. On that basis, it was submitted that clause 4 of the Recognition Agreement dated June 23, 2016 provides as follows;

“... this agreement shall come into force on the June 23, 2016 and shall continue in force until amended or terminated by either party giving Three Months’ Notice in writing on intention to terminate.”

26. He submitted further that as was held in *Amalgamated Union of Kenya Metal Workers V Jaykay Mechanical Engineering Company Limited* [2019] eKLR, that a recognition agreement can be terminated in three ways; under section 54 of the *Labour Institutions Act*, under the agreement itself or by a court order

27. From the foregoing, the Respondent submitted that since a recognition can be terminated by its own terms, the Recognition agreement that bound parties was terminated by its own terms and a letter of notice by the Respondent’s dated July 7, 2022, therefore, there no longer exist an agreement between the parties to warrant an order compelling them to proceed with negotiation on the CBA.

28. On whether they have coerced or victimized the Applicant’s members, it was submitted that no evidence had been tabled before this Court to justify such interference at all, therefore the claim remains unsubstantiated. In this they relied on the case of *Kudbeiba Workers v United State International University –Africa(USIU)* [2021] eKLR where the Court held that;

“It is the Claimant’s allegation that the Respondent instilled fear its employees thereby forcing them to resign from membership of the Claimant. The Claimant did not table any evidence to prove this allegation and accordingly this prayer fails.”

29. In conclusion, it was submitted that the recognition agreement which forms the basis of the suit herein terminated pursuant to its own terms and a notice on July 7, 2022, therefore there is nothing that the parties can negotiate on. Further that the allegation of victimization has not been proved by the Respondent as required under section 11 of the *Labour Relations Act*. They prayed for the application to be dismissed.

30. I have considered all the averments and submissions of the parties herein.

31. The applicant contends that the Respondent reneged on the agreement between the parties and refused to enter negotiations for signing a CBA.

32. The Respondents on their part aver that they couldn’t continue with the CBA negotiations as the applicants no longer have a simple majority of members. The Respondents also aver that they terminated the recognition agreement between them and the Claimants vide a notice dated July 7, 2022 and are no longer obligated to continue with any CBA negotiation.

33. The Respondents content that clause 4 of the recognition agreement had allowed the termination by giving three months notice in writing on intention to terminate.

34. Section 54 of the *Labour Relations Act* gives provision on the issue of recognition agreements and CBA. Section 54(3) provides as follows;

“(3) An employer, a group of employers or an employer’s organisation referred to in subsection (2) and a trade union shall conclude a written recognition



agreement recording the terms upon which the employer or employers' organisation recognises a trade union".

35. Section 54(5) on the other hand provides that;-

“(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement”.

36. My understanding of the law is that for a recognition agreement to be revoked the matter should be considered by the National Labour Board. The Respondent submitted that indeed they had a recognition agreement with the Claimant but the same was revoked as per the provision of clause 4 of the recognition agreement.

37. Clause 4 of the agreement provides as follows;-

“4. Modification To And Termination Of This agreement”

This agreement shall come into force on the 23rd day of June 2016 and shall continue in force until or amended or terminated by either party by giving three months' notice in writing of intention to terminate.

Either party wishing to amend or modify the agreement shall give three (3) months' written notice to the other party with details of the proposed amendments of the agreement, then either party may refer the dispute to the minister for labor for normal action terms of the [Labour Relations Act, 2007](#).

Both parties to this agreement recognize that they are non-political organizations solely concerned with the welfare of all those engaged in the university, be they Employer or employees”.

38. Indeed this clause provides for termination and modification of this agreement. The Respondents have submitted that they gave notice to terminate the recognition agreement vide a letter of July 7, 2022 to which the applicants never responded to.

39. In the circumstances of this case I find that there is no recognition agreement between Claimant and Respondent and therefore CBA negotiations cannot proceed.

40. I find the claim therefore not merited and I dismiss it accordingly.

41. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF MARCH, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Owiti for Claimant Union – present

Mwiti for Respondent – present

Court Assistant – Fred

