



Kenya Union of Commercial Food and Allied Workers v Kitui Teachers DT Sacco Society Limited (Cause E018 of 2023) [2023] KEELRC 853 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 853 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E018 OF 2023**

**L NDOLO, J
APRIL 13, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

KITUI TEACHERS DT SACCO SOCIETY LIMITED RESPONDENT

RULING

1. On January 18, 2023, the claimant filed a memorandum of claim citing the issue in dispute as ‘Negotiation of Collective Bargaining Agreement Clauses’ and seeking the following remedies:
 - a. An order adopting the claimant’s proposals on the proposed Collective Bargaining Agreement (CBA);
 - b. An order directing the respondent to sign the 2022-2023 CBA within 30 days from the date of judgment;
 - c. In the alternative, an order directing the respondent to engage the claimant in negotiation of the 2022-2023 CBA and to conclude it within 60 days;
 - d. An order restraining the respondent from victimising, intimidating, coercing, harassing, discriminating, terminating or disciplining the claimant’s members on account of their trade union membership.
2. Alongside the memorandum of claim, the claimant filed a notice of motion dated January 11, 2023, seeking the following orders:
 - a. An order directing the central monitoring unit to analyse the issue in dispute and provide an economic report within 45 days upon receipt of the response;



- b. An interim order restraining the respondent from victimising, intimidating, coercing, harassing, discriminating, terminating or disciplining the claimant's members on account of their trade union membership.
3. The motion is supported by an affidavit sworn by the claimant's Assistant General Secretary, Jackson Kyunuve and is based on the following grounds:
 - a. That the parties have a valid recognition agreement relative to recognition and negotiating procedure that is in force;
 - b. That pursuant to the said recognition agreement, the claimant and the respondent have negotiated several CBAs, the last one being for the period 2020-2021;
 - c. That on December 6, 2021, the claimant wrote to the respondent, expressing its desire to review the outgoing CBA clauses and submitted its proposals to the respondent for perusal;
 - d. That on January 10, 2022, the respondent wrote to the claimant proposing a meeting for CBA negotiations;
 - e. That the parties met but the respondent expressed its unwillingness to negotiate another CBA, citing a high wage bill and its intention to introduce performance contracts;
 - f. That the claimant made efforts to persuade the respondent to reconsider its position, all in vain;
 - g. That after several failed attempts by the claimant in trying to enter into a voluntary negotiation with the respondent, the claimant reported a dispute to the Cabinet Secretary, Ministry of Labour, upon which a conciliator was appointed;
 - h. That the respondent embarked on victimisation and intimidation of the claimant's members, by calling them for meetings and demanding that they withdraw and resign from the union, to frustrate the CBA negotiations;
 - i. That even after numerous conciliation meetings and other meetings triggered by the claimant outside conciliation, the respondent has refused to negotiate with the claimant;
 - j. That the claimant's members continue to suffer and their right to engage in collective bargaining ought to be observed;
 - k. That the claimant's members have a right to collective bargaining and reasonable working conditions;
 - l. That it is in the interest of justice that the prayers sought are granted.
4. The respondent's response is by way of a replying affidavit sworn by its Chief Executive Officer, Florence Mutua on January 24, 2023.
5. Mutua depones that the respondent has a current workforce of eighty (80) out of which only thirty-three (33) had voluntarily joined the claimant union.
6. She concedes that the parties have negotiated several CBAs, the latest one being for a period of two (2) years effective January 1, 2020 to December 31, 2021.
7. Mutua further depones that before expiry of the last CBA on December 31, 2021, the 33 unionised members expressed their intention to terminate their membership with the claimant.



8. Mutua adds that upon receiving the claimant's letter for negotiation towards renewal of the retiring CBA, the respondent had a discussion with its unionised employees, who indicated their intention to terminate their union membership.
9. It is further deponed that the unionised employees issued letters dated June 24, 2022, terminating their union membership. The respondent subsequently issued a 30 days' termination notice to the claimant.
10. The respondent denies victimising, intimidating, coercing, harassing, terminating, discriminating or disciplining the claimant's members and maintains that the unionised employees terminated their membership voluntarily. The respondent asserts that it was only acting as an intermediary between the unionised employees and the claimant.
11. The parties' pleadings filed in court reveal that the actual dispute has to do with negotiation of a new CBA. The claimant accuses the respondent of frustrating the negotiation process while the respondent maintains that the claimant has lost its simple majority status which entitles it to negotiate a CBA on behalf of its members.
12. Section 54 of the *Labour Relations Act* sets the threshold for recognition of a trade union for purposes of collective bargaining, being a simple majority of the unionisable employees.
13. The claimant pegs its case on the existence of a recognition agreement.
However, a reading of the law demonstrates that a trade union can lose its place on the collective bargaining table if its membership drops below the simple majority threshold.
14. This position was affirmed in *Kenya Jockey and Betting Workers Union v Resort Kenya Limited* [2014] eKLR in the following terms:

“Where membership of a union has changed and there is no simple majority, there is the possibility of the subject union losing on recognition that they have previously enjoyed due to the simple fact of lack of a simple majority.”

15. This was reiterated in subsequent decisions of this court (variously constituted). In *Bakery, Confectionery, Food Manufacturing and Allied Workers Union (K) v Mombasa Maize Millers Limited & 3 others* [2016] eKLR Rika J stated the following:

“...recruitment of Employees is a continuous process, and grant of recognition, does not end the requirement for the Trade Union to remain relevant, most representative, and with a healthy majority in the collective bargaining unit...Recognition, once granted must therefore not be viewed as cast in bronze. Labour is highly mobile. It is not inconceivable that Employees upon which the initial recognition is made, all move out of the workplace for various reasons, after recognition is granted, leaving their Trade Union with an empty shell of a collective bargaining unit. An employer may change its business, in which case the Trade Union's relevance is lost.

The court has taken the position that it is not barred from declaring a recognition agreement invalid and void, in appropriate circumstances. The Employer may apply to the National Labour Board to derecognize a Trade Union under section 54[5] of the *Labour Relations Act*. The Agreement may come to an end through its own terms. It may be ended through an order of the court. The Trade Union must remain relevant and most representative, and retain a majority of the current Employees as its members. Recruitment has no end.”



16. The import of the foregoing is that a trade union is not insulated from being edged out of an establishment by the existence of a recognition agreement.
17. The question whether the claimant in this case has lost its simple majority is a matter to be determined at the hearing of the main claim. For now, I am required to rule on the interlocutory application by which the claimant seeks two orders namely;
 - a. An order directing the central monitoring unit to analyse the issue in dispute and provide an economic report within 45 days upon receipt of the response;
 - b. An order restraining the respondent from victimising, intimidating, coercing, harassing, discriminating, terminating or disciplining the claimant's members on account of their trade union membership.
18. In light of the contested issue of the claimant's capacity to negotiate a CBA, order (a) cannot be granted at this stage.
19. Regarding order (b) which falls within the province of an interlocutory injunction, the claimant is required to surmount the following conditions set out in *Giella v Cassman Brown Co Ltd* [1973] EA 358:
 - a. Establish a *prima facie* case with a probability of success;
 - b. Demonstrate that if the orders sought are not granted, it stands to suffer irreparable harm, which cannot be compensated by an award of damages; and
 - c. Show that the balance of convenience tilts in its favour.
20. As held by the Court of Appeal in its decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the three conditions are to be applied as separate hurdles to be surmounted sequentially.
21. The first question to ask is whether the claimant has established a *prima facie* case.
22. A *prima facie* case was defined by the Court of Appeal in *Mrao v First American Bank Kenya Limited & 2 others* [2003] KLR, 123 as follows:

“A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
23. The claimant's complaint is hinged on the averment that the respondent is victimising and intimidating its members to leave the Union. Attached to the replying affidavit sworn by the respondent's Chief Executive Officer, Florence Mutua are resignation letters addressed to the claimant by its members. No evidence was led to support the allegation that these letters were written through coercion by the respondent.
24. In the result, I find and hold that the claimant has failed to establish a *prima facie* case to warrant an interlocutory injunction. With this finding, I do not need to consider the other two conditions in *Giella v Cassman Brown (supra)*.
25. The application dated January 11, 2023 is therefore disallowed with costs in the cause.
26. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Macharia (Union Representative) for the Claimant

Miss Mbilo for the Respondent

