



Kenya Plantation & Agricultural Workers Union v Big Flower Limited (Employment and Labour Relations Cause 24 of 2020) [2023] KEELRC 1507 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1507 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 24 OF 2020**

**HS WASILWA, J
JUNE 13, 2023**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
BIG FLOWER LIMITED RESPONDENT**

RULING

1. This Ruling is in respect of the Claimant's Notice of Motion dated July 20, 2020, filed under certificate of urgency pursuant to Article 36 and 41 of *the Constitution*, Section 12 of the *Employment and Labour Relations Court Act*, Sections 4 and 48 of the *Labour Relations Act* and all other enabling provisions of law, seeking for the following Orders; -
 - 1) Spent.
 - 2) Spent.
 - 3) The Honourable Court be pleased to compel the Respondent to deduct and remit Union dues from the emoluments of the Two Hundred and Ninety-Nine (299) employees of the Respondent or any number thereof who have signed into the claimant/ Applicant's Union membership and remit the dues so deducted to the claimant/ Applicant.
 - 4) The Honourable Court be pleased to compel the Respondent to sign a recognition agreement with the claimant/ Applicant herein.
 - 5) This Honourable court be pleased to compel the Respondent to revert into paying the employees monthly salary so as not to deny them their constitutional rights.
 - 6) Costs of this Application be borne by the Respondent.



2. The Application is supported by the grounds on the face of the application and the Affidavit of Thomas Kipkemboi, The Deputy Secretary General of the claimant Union, deposed upon upon the July 20, 2020.
3. The Affiant described the claimant as a trade Union, registered within the meaning of section 2 of the *Labour Relations Act*, representing employees within the agricultural sector, while the Respondent is a limited liability company that carries out business of floriculture for local and export markets.
4. He stated that on June 17, 2020, the claimant conducted a membership recruitment exercise at the Respondent's premises whereupon 229 employees signed the membership check-off form (form S), indicating their intention to join the Union and authorising the Respondent to deduct Union dues from their salaries and remit to the Union.
5. Upon receiving all Check-off forms, the Applicant served the Respondent with the membership forms requiring it to deduct and remit the Union dues but the Respondent has failed to effect any deductions to date in contravention of the law.
6. The failure by the Respondent to deduct and remit the Union dues has exposed the Applicant to hardship as it has been denied resources necessary in serving its members particularly the 229 employees at the Respondent's employ.
7. After recruiting the simple majority of the Respondent's unionisable employees, the Applicant send the Respondent recognition agreement for their execution but the Respondent has refused to sign it.
8. The Respondent has now verbally terminated the services of most of the said employees that signed the check off form in the bid to frustrate them from joining the Union. The termination was carried out without any notices or disciplinary hearing.
9. The Applicant urged this Court to move with speed and stop the Respondent's action of terminating the said employees for the sole reason of joining its Union. He added that the employees of the Respondent will suffer irreparable loss if the Court does not grant the Orders sought.
10. The application is opposed by the Respondent who filed a replying affidavit deposed upon on August 31, 2020, by Dorothy Moindi, the Respondent's Human Resource Officer.
11. The affiant stated that the Respondent is indeed a Limited liability company engaged in Business of growing and exporting Cut flowers and they are located in Timau within Meru County.
12. He denied knowledge of any recruitment exercise that was allegedly carried out by the claimant Union on any of their employees and stated that none of the documents served to them belong to any of their employees and therefore they could not make any deduction when there was no employer-employee relationship.
13. She stated that the employees working for them were employed by third party manpower provided, which information is in the employment contract and records of the said employees.
14. She maintained that the 299 person are working for them but were outsourced as such the outsourcing company should be the one liable for any Union dues if at all. She then prayed of the Application to be dismissed,
15. The Application was canvassed by written submission.



Applicant's Submissions

16. The Applicant submitted that for an employer to sign a recognition Agreement, the Union must show that they have recruited a simple majority of its unionisable employees as provided for under the [Labour Relations Act](#). In that regard the Applicant submitted that they recruited 299 employees from the Respondent who were more than a simple majority and therefore it behooved the Respondent to recognize the Union, remit Union dues and Sign the Recognition agreement.
17. To Support this argument, the Applicant relied on the case of [Kenya National Union of Nurses v Friends Lugulu Mission Hospital](#) [2021] eKLR where the Court held that,

“Recognition for purposes of collective bargaining is a mandatory requirement under Section 54(1) of the [Labour Relations Act](#). As observed earlier in the judgement, the only precondition is the recruitment of simple majority of unionisable employees in the organization. Once this condition is met recognition is mandatory.”
18. They also relied on the case of [Kenya Union of Domestic Hotels, Education Institution, Hospital and Allied Workers V Lukhokho Secondary School](#) [2016] eKLR and submitted that Respondent violated section 48 of the [Labour Relations Act](#) by failing to participate in the conciliation and section 19(1) (g) and (i) by failing to deduct and remit union dues in accordance with the check-off forms submitted by the union. The Respondent also failed to comply with section 54 of the [Labour Relations Act](#) by failing to sign the Recognition Agreement. Further violated Article 41 of [the Constitution](#) by denying the Claimant and its members the freedom to enjoy their constitutional freedom of association.
19. It is the Applicant's Submissions that any employer who fails to act on the check off forms and deduct union dues is guilty of an offense under section 50(10) of the [Labour Relations Act](#). Similarly, that the Respondent has engaged in victimizing, harassing and intimidating its members for joining the Union, which acts are unconstitutional and unlawful because their freedom of Association, right to assembly and fair labour practices are guaranteed under Articles 36, 37 and 41 respectively of [the Constitution](#). Moreover, that termination of any employee on the basis of joining a trade Union is outlawed under Section 46(c) of the [Labour Relations Act](#).
20. Based on the foregoing, the Applicant urged this Court to allow the Application as prayed.

Respondent's Submissions.

21. The Respondent submitted on Five issues; whether there is an employment relationship between the employees in question and the Respondent, whether the Respondent should be compelled to sign the recognition agreement, whether the Respondent victimized any member of the claimant, whether the Respondent should be ordered to deduct and remit Union dues from the Employees that have signed check off forms and who should pay costs of this Application.
22. On the first issue, the Respondent submitted that there is no privity of contract between the employees in question and the Respondent because the Employees in question are not Respondent's employees but outsourced from a third party man power provider. It was argued that all employees' affairs such as welfare, payroll, occupational health and safety et al are managed by the outsourcing company therefore that there is no direct control of the said employees or any direct employment relationship to require the respondent to recognize the claimant herein. In this they relied on the case of [Maurice](#)



Oduor Okech v Chequered Flag Limited [2013] eKLR that cited the case of *Everest Aviation Limited v Kenya Revenue Authority* [2013] eKLR where the Court held that;-

“...In determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behavior of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.”

23. On the second issue, the Respondent submitted that since there is no direct employment relationship between the employees and the Respondent, the Respondent cannot be obliged to enter into a recognition agreement with the Respondent because the threshold under Section 54(1) of the *Labour Relations Act*, has not been met being that the Respondent is not an employer of the subject employees. In this they relied on the case of *Kenya Petroleum Oil Workers Union V Giefcon Limited & Another* [2015] eKLR where the Court held that; -

“The Court finds neither of the Respondents can be ordered to recognize the Claimant Union. The conditions for recognition under Section 54 of the *Labour Relations Act*, have not been shown to exist. Parties do not have a relationship which would justify recognition. It would not be possible for the Claimant to collectively bargain in the absence of an Employer, and a collective bargaining unit. An order for recognition would amount to the Court asking the Claimant to clap with one hand.”

24. The Respondent submitted further that the claimant has not tabled any evidence first showing that it has recruited a simple majority of the employees and secondly that it served the alleged Recognition agreement on the Respondent. Without any evidence of service of the said documents the Respondent cannot be faulted for not taking action on the said issue.
25. On the allegation of victimization and harassment, the Respondent submitted that no harassment has been meted against either their employees or the outsourced employees. In any event that the allegations have not been supported by any evidence in form of statements or affidavits. Thus the claim herein should fall.
26. On whether the respondent should be compelled to deduct Union dues, it was submitted that since the management of the said outsourced employees including payroll is carried out by the outsourcing company, the Respondent is not in a position to deduct any dues for the said employees as such the prayer herein is untenable. In this they relied on the case of *Kalya Soi farmers' Cooperative Society V Paul Kirui & Another* [2013] eKLR where the Court held that;-

“...the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.”

27. On costs, it was submitted that the claimant having failed to demonstrate the basis of the orders sought should not be awarded costs. The Respondent urged this Court to dismiss the Application herein because the issues raised are based on a situation where there is employment relationship between the Employees and the Respondent and having outsourced its employees the Respondent for the purposes



of labour relations cannot be compel the enter into recognition agreement or deduct dues for the subject employees. He prayed for the application herein to be dismissed with costs.

28. I have examined the averments and submissions of the parties herein.
29. It is apparent that the members recruited by the claimant Union work for the respondent company.
30. The respondents have however argued that the employees have been outsourced from an outsourcing company and therefore they are not liable to remit any Union dues or sign any recognition with the Union.
31. The respondents content that the Union members are not their employees.
32. At this point then, the onus of proving an employment relationship lies with the Union.
33. The only evidence that the claimants have submitted before this court are the check off forms sent to the respondents.
34. There is no employment letter, appointment letter or even payslips linking the claimants members to the respondents.
35. In this case then, the claim by the claimants falls short of the evidence required to prove their case.
36. I therefore find the claim cannot stand and I dismiss it accordingly.
37. There will be no order of costs.

Ruling delivered virtually this 13th day of JUNE, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Awino for Claimant – present

Wairimu holding brief for Kinyanjui for Respondent – present

Court Assistant - Edna

