



**Kenya Union of Water and Sewerage Employees v Tana and Athi Rivers
Development Authority; Union of Kenya Civil Servants (Interested Party)
(Cause E288 of 2021) [2023] KEELRC 1929 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1929 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E288 OF 2021
MA ONYANGO, J
JULY 31, 2023**

BETWEEN

KENYA UNION OF WATER AND SEWERAGE EMPLOYEES CLAIMANT

AND

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY RESPONDENT

AND

UNION OF KENYA CIVIL SERVANTS INTERESTED PARTY

JUDGMENT

1. The Claimant is a trade union registered under the *Labour Relations Act*, mandated to represent labour rights of water sector employees within the Republic of Kenya as more specifically set out in the membership clause in its Constitution.
2. The Respondent is established under section 3 of the *Tana and Athi Rivers Development Authority Act*, cap 443 of the Laws of Kenya, as a body corporate with perpetual succession and a common seal, capable in its corporate name of suing and being sued, taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property, borrowing and lending money, and doing or performing all such other things or acts for the proper performance of its functions under the Act as may be lawfully done or performed by a body corporate.
3. The Interested Party is also a trade union registered under the *Labour Relations Act* to represent employees in the civil service.
4. The Claimant avers that it has a valid Recognition Agreement and a running CBA in force with the Respondent and has been receiving monthly union dues up to and including the month of February



- 2021 when the Respondent intentionally ordered for the stoppage of the Claimants monthly union dues through an internal memo dated March 26, 2021.
5. The Claimant avers that the action or inaction of the Respondent is dictatorial in nature as the Claimant is the sole union in the sector as far as the terms of the Recognition Agreement between it and the Respondent is concerned which agreement is now being violated after the Respondent dictatorially stopped the deduction and remittance of union dues without following the laid down procedure.
 6. The Claimant seeks the following orders –
 - i. A declaration that the action and or inaction by the Respondent on March 26, 2021 were unfair and unlawful;
 - ii. An order compelling the Respondent to pay from its own Account to the Claimant's the amount equivalent to the normal amount which it normally pays on monthly basis as well as the COTU percentage and the Nairobi Tarda Branch of the Kenya Union of Water and Sewerage Employees.
 - iii. Costs of the suit
 - iv. Interests on (b) and (c) above at court rates from the date of filing of suit till payment in full.
 7. At the time of filing the Memorandum of Claim the Claimant simultaneously filed a Notice of Motion dated April 6, 2021 seeking for orders that;
 - i. Spent;
 - ii. That the Honourable Court be pleased to issue an interlocutory order staying and or suspending any decision arising from the Respondent's Memo dated March 26, 2021 purporting to stop the deductions and remittances of trade unions dues from the month of March 2021 to the Applicant pending the hearing and determination of this application and status quo before the said memo be maintained;
 - iii. The honourable court be pleased to issue an interlocutory order staying and or suspending any decision before, during and after which might result to the memo dated March 26, 2021 pending hearing and determination of this instant suit;
 - iv. The honourable court be pleased to issue an interlocutory order quashing any decision and or resolutions made before, during and after pending hearing and determination of this suit;
 - v. That pending the hearing and determination of this application, there be a mandatory order compelling the respondent to deduct trade union dues and remit the same as usual to the claimant union;
 - vi. That cost of this application be provided for.
 8. Upon considering the application ex-parte the court granted prayer 2 above. Thereafter an application dated June 29, 2021 was filed seeking to have the Interested Party enjoined which prayer was granted vide a ruling delivered on July 5, 2022.
 9. It would appear that the Respondent and the Interested Party did not file any response to the instant claim as none is on record.
 10. On July 20, 2022, the court directed that the claim be canvassed by way of written submissions. All the parties filed submissions. The Claimant filed submissions dated November 14, 2022. The submissions of the Respondent are dated November 14, 2022. The Interested Party did not file any submissions.



11. In its submissions the Respondent states that it acted lawfully by instructing the employees to remit their trade union dues to their union of choice vide the memo dated June 23, 2021. It is its submission that it acted in accordance with Sections 5, 48(6) and 50(6) of the *Labour Relations Act*, that the Recognition Agreement and the Collective Bargaining Agreement (CBA) have no clause that binds the Respondent to deduct union dues and remit to the Claimant through a check off system and lastly, that the Collective Bargaining Agreement in place is not valid. It is thus submitted that there exists no contractual agreement between the Respondent and the Claimant that binds the Respondent to deduct union dues through a check off system nor is the Respondent bound to deduct and remit employee union dues on behalf of the claimant. That as such, the Claimant cannot claim that the memo dated March 26, 2021 is illegal as the Respondent instructed the employees to remit their dues to the trade union of their choice.
12. The Respondent has argued that it is caught between a rock and hard place as the Claimant insists that the Respondent implements the check off and many of the Respondent's employees maintain that they are not members of the Claimant Union. In this regard, the court was referred to Section 48 (6) of the *Labour Relations Act* to buttress the position that an employer may not make any deductions from an employee who has notified the employer in writing that the employee has resigned from the union.
13. According to the Respondent, the Claimant has not discharged its evidentiary burden of producing a Kenya Gazette Notice from the Minister for Labour requiring the Respondent to implement a check off system to make payments of the remaining members of the Claimant as was held in the case of *Kenya Union of Domestic Hotels, Educational Institutions, Hospital & Allied Workers (KUDHEIHA) Vs British Army Training Unit Kenya* (2015) eKLR.
14. It is also submitted that the Collective Bargaining Agreement in place is not valid as the Collective Bargaining Agreement was signed on May 2, 2015 to cover a period of two years and is yet to be renewed to date. According to the Respondent, the Collective Bargaining Agreement has no binding force on the Respondent as the CBA has not been renewed thus far.
15. The court was thus urged to dismiss the claim.

Determination

16. Upon considering the pleadings and the submissions on record, I find the issues for determination in this case to be:
 - i. Whether there exists a valid Recognition Agreement between the Claimant and the Respondent herein;
 - ii. If the answer to (i) is in the affirmative, whether the Claimant is entitled to the reliefs sought.
17. It is not in dispute that the Claimant and the Respondent have a Recognition Agreement signed on signed on June 26, 2013. It is further not in contention that the Claimant and the Respondent negotiated a CBA which was signed on May 2, 2015 to cover a period of two years. It would appear that the said CBA has never been reviewed.
18. The bone of contention in this case is the Respondent's internal memo dated March 26, 2021 which purported to stop the Claimants monthly union dues.
19. The said memo is reproduced hereunder:
Tana and Athi Rivers Development Authority
Internal Memo



From: Ag MD
Ref: Tarda/conf/1avol.iii
TO: All concerned staff
CC: Chief Managers, H.O.D's
DATE: March 26, 2021
Project Managers, RCs
Subject: Union Membership

This is in reference to management memo dated January 13, 2021 on above subject.

The purpose of the memo was to advice staff to confirm their preferred Union in order to solve the Union membership dispute. However, this has prompted conflict between the representatives of the two union bodies as they are fighting over union membership subscription fee.

In view of the foregoing, management has decided to temporarily stop deduction of subscription fees through the payroll with effect from the month of March 2021. Staff are therefore advised to pay their subscription directly to the union of their choice. Meanwhile, the management will continue making wider consultations with the view of resolving this stalemate.

Signed

Emilio N. Mugo

20. It is not disputed that the Respondent and the Claimant signed a Recognition Agreement on June 26, 2013. The agreement was signed by The Managing Director of the Respondent and the National General Secretary of the Claimant. Thereafter the parties negotiated a CBA.
21. It is the Respondent's contention that the Collective Bargaining Agreement in place is not valid as the Collective Bargaining Agreement was signed on May 2, 2015 which was for a period of two years and is yet to be renewed to date.
22. Section 59 of the [Labour Relations Act](#) provides for effect of collective agreements as follows:
 1. A collective agreement binds for the period of the agreement—
 - a. the parties to the agreement;
 - b. all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or
 - c. the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.
 2. A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association.
 3. The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
 4. A collective agreement shall be in writing and shall be signed by—



- a. the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and
 - b. the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary.
5. A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties. 60. Registration of collective agreement
23. As provided in section 59(2) and (3) the terms of a collective agreement are incorporated into the contracts of employees who are party thereto so that the same can never lapse. Further, the CBA always provides that after the period covered therein expires it will remain in force until amended.
24. The argument of the Respondent that the CBA is no longer in force is therefore not tenable as it will remain part of the terms and conditions of service of all employees who were party thereto until replaced by new terms in a fresh agreement.
25. Further, the Recognition Agreement which came into effect on June 26, 2013 provides under paragraph 4 thereof that it would be in force for a minimum period of four years until amended or terminated.
26. The Recognition Agreement has not been terminated and therefore remains in force. Section 54(5) of the [Labour Relations Act](#) provides for the termination of recognition agreements as follows;
- (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
27. Until terminated or revoked in the manner provided in the Act, the recognition agreement between the Claimant and the Respondent remains in force.
28. With respect to the Interested Party, this court stated in the ruling delivered on July 5, 2022 that it must prove the allegations that it has recruited 200 employees of the Respondent. The court explained that this was because the Claimant had a recognition agreement and had negotiated a collective agreement and therefore had a right of protection by virtue of the recognition agreement.
29. The court further held as follows at paragraphs 35 to 43:
35. The Interested party must further prove that its constitution permits it to represent employees of the Respondent as provided under Section 54(8) of the [Labour Relations Act](#) which provides: -
- (8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.
35. Although Article 41(2)(c) of the [Constitution of Kenya, 2010](#) provides for the right of every worker to form, join or participate in the activities and programs of a trade union,
36. this right is not a licence of any worker to join membership of any union, the [Labour Relations Act](#) provides for every union to have a constitution which must provide for certain matters, among them the objects of the union and the membership.
35. The same right is provided under Section 4(1) of the [Labour Relations Act](#):



- i. Every employee has the right to—
 - a. participate in forming a trade union or federation of trade unions;
 - b. join a trade union; or
 - c. leave a trade union.
35. The constitution and rules of the Applicant, the Union of Kenya Civil Servants provides for membership at Article 4 as follows:
1. Membership of the Union shall be open to employees in the Public Service of the Government of the Republic of Kenya, commonly known as “Public Servants” and whose remuneration is derived directly from estimates voted for by the Parliament of Kenya provide or from the Consolidated Fund of the Government of Kenya.
 2. Every member shall pay such amounts of prescribed monthly subscriptions as may from time to time be determined by the National Delegates Conference or Special Delegates Conference
 - a. through check-off system; or
 - b. by cash in advance annually at a rate to be determined by a National Delegates Conference.
 3. Upon admission to membership of the Union, a member shall be this Constitution, the Rules of the Union, the General Standing Orders i resolutions and decisions of the organs of the Union.
 4. Any subscription or other donations paid to the Union shall not refundable except where such subscription or donation was made in er and the final decision to that effect shall be made by the National Executive Board.
35. Article 1 of the said constitution assets its supremacy at Article 1A which provides:
- i. This Constitution, and as it may from time to time be amended, is Supreme and its Provision shall have binding effect on all Members, Union Officials, Union Organs and Structures, and Employees of the Union.
 - ii. The Provisions of this Constitution shall take precedence over and above any other rule(s) and/ or regulation(s) of the Union or its Organs, where such rule(s), regulation(s) and/or Organs are inconsistent with the Provisions of this Constitution.
35. Further, Article 3 which sets out the objects and functions of the union provides at sub article 1(1) as follows: -
- i. The object and functions of the Union shall be to –
 - a. to improve the relationship between employees and employers in the Public Service of the Government of the Republic of Kenya as specific in Article 4 of this Constitution;
 - b. to negotiate for better terms and conditions of employment for all Conference held every five years; Union members and unionisable employees of the Public Service;
 - c. to effectively represent the members of the Union in all grievances and disputes, and promote efficient settlement of disputes and grievances arising between employees and



employers through conciliation, arbitration or otherwise and generally to safeguard the interest of the members.

- d. to establish and maintain funds by means of membership subscriptions, contributions, levies and by borrowing on such security and on such terms as may from time to time be authorised or approved by the Advisory Council;
- e. to seek and obtain legal', other professional and other consultancy services in the delivery of quality representation by the Union and /or in the defence of the rights of a member on matters arising out of the relationship with their employer, subject to the approval of the National Executive Board;
- f. to collect and disseminate among members of the Union such statistical information concerning all matters affecting the Union or to print, publish and issue such papers, periodicals, books, circulars and other literature as may be seen conducive in the furtherance of the objectives of the Union;
- g. strive and work towards ensuring guarantee job security and shall endeavour to seek facilities for its members and full-time employees of the union, to obtain education and training and also to improve the general welfare of members and the Union's full time employees;
- h. the Union shall save at least 10% of its total revenue per month and create a reserve account, separate from the other Union Account(s), and utilize the monies to respond to any emergency that directly benefits Union members and/or acquire either by purchase, lease or otherwise any movable or immovable property or other assets. The review of the contribution towards the reserve account shall be done from time to time by the National Delegates Conference. Any withdrawals from the reserve account shall only be made with the Authority of the National Executive Board;
- i. to collaborate with other workers unions in agitating for the improvement of labour legislation in order to be more beneficial to workers and for the repeal or amendment of unfavourable legislation which have adverse effect on members and other workers;
- j. to co-operate with other workers organisations on common issues and in solidarity for joint actions to promote and safeguard the interests of members and workers;
- k. affiliate with the international confederations in the consolidation of workers solidarity globally;
- l. in pursuance of these objectives, the Union shall do, or cause to be done such acts and things, as it considers necessary for the furtherance these objectives and generally to do everything to promote the interest all or any of its members or anything beneficial to the interests of the individual members of the Union;
- m. to pursue other objects which a trade union may legally perform in the interest of its members and in the furtherance of the trade union movement.”

35. As has been submitted by the Applicant, the Respondent is established under Section 3 of the *Tana and Athi Rivers Development Authority*, Chapter 443 of the Laws of Kenya. It is established under Section 3 of the Act as a body corporate with perpetual successions and a common seal, capable in its corporate name of suing and being sued, taking, purchasing or otherwise acquiring, holding, charging an disposing of movable and immovable property, borrowing and lending money, and doing



or performing all such other things or acts for the proper performance of its functions under the Act as may be lawfully done or performed by a body corporate.

35. Appointment of staff of the Respondent is provided for under Section 9 as follows –

9. Appointment and remuneration of staff

- i. The Authority may appoint, upon such terms and conditions as it thinks proper, such other officers and servants as it considers necessary or desirable for the efficient conduct and operation of its affairs.
- ii. The officers and servants appointed under subsection (1) shall—
 - a. subject to this Act, exercise the powers and functions and perform the duties assigned to them from time to time by the managing director; and
 - b. be paid out of the funds of the Authority such salaries as the managing director, with the approval of the Authority, may from time to time determine and other expenses as they may incur in the performance of their duties.

35. On the contrary, the civil servants are appointed by the Public Service Commission as set out under Article 234 of the [Constitution of Kenya, 2010](#) among them to following:

(2) The Commission shall—

- a. subject to this Constitution and legislation—
 - i. establish and abolish offices in the public service; and
 - ii. appoint persons to hold or act in those offices, and to confirm appointments;
- b. exercise disciplinary control over and remove persons holding or acting in those offices;

30. The Interested party has not adduced evidence to warrant the court to change the position held in the ruling.

31. It is common ground that the Respondent is a state corporation engaged in the water sector. Its employees are therefore covered under the constitution of the Claimant by virtue of Section 54(8) of the [Labour Relations Act](#).

32. From the foregoing, and based on the fact that the Claimant represents unionisable employees in the water and sanitation industry it follows then that the Claimant is the rightful trade union to represent the Respondent's unionisable employees.

33. Consequently, this court finds that the Respondent was in breach of the terms of the Recognition Agreement between it and the Claimant by purporting to stop the Claimant's monthly union dues through its internal memo dated March 26, 2021.

34. The Respondent submitted that the Recognition Agreement and the Collective Bargaining Agreement (CBA) have no clause that binds the Respondent to deduct union dues and remit to the Claimant through a check off system and that there exists no contractual agreement between the Respondent and the Claimant that binds the Respondent to deduct union dues through a check off system nor is the Respondent bound to deduct and remit employee union dues on behalf of the claimant. That as such, the Claimant cannot claim that the memo dated March 26, 2021 is illegal as the Respondent instructed the employees to remit their dues to the trade union of their choice.



35. Section 48(2) and (3) of the *Labour Relations Act* require every employer with more than 5 employees belonging to a union to deduct and remit union dues in the prescribed Form S. Form S is the check off form sent by trade unions to employers in respect of employee who have joined trade union membership.
36. Further, the recognition agreement provides that the employer recognises the union as the sole labour organisation representing the interests of its workers in all negotiable matters. Therefore, until the agreement is terminated in the manner provided in section 54(5) of the *Act*.
37. In the end, the claim succeeds and the court makes the following orders:
- i. A declaration be and is hereby made that the action of the Respondent stopping the deduction and remittance of union dues to the Claimant is unlawful.
 - ii. The Respondent is directed immediately commence deduction of union dues and remit to the claimant and COTU as per the check off forms.
 - iii. The Respondent shall pay the Claimant's costs assessed at Kshs 100,000/- .

DATED, DELIVERED VIRTUALLY AT ELDORET

THIS 31ST DAY OF JULY, 2023.

M. ONYANGO

JUDGE

