



Kenya Scientific Research International Technical and Institutions Workers Union v Thermopark Limited (Cause 2170 of 2016) [2023] KEELRC 1780 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1780 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2170 OF 2016
SC RUTTO, J
JULY 14, 2023**

BETWEEN
KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL AND INSTITUTIONS WORKERS UNION CLAIMANT
AND
THERMOPARK LIMITED RESPONDENT

JUDGMENT

1. By way of a Memorandum of Claim filed on October 24, 2016, the claimant union seeks the following orders and declarations: -
 - a. The honourable court should order and direct the respondent to allow the claimant Union access to recruit unionisable employees;
 - b. The honourable court should order and direct the respondent to pay the costs of the suit.
2. The claimant avers that the respondent has failed to allow it access to its premises to recruit unionisable members and that the respondent's employees have been denied their constitutional right to join the Union of their choice.
3. Putting the claimant to strict proof, the respondent avers that it has not denied the union's officers, access to its premises. The respondent further states that it has never prevented, obstructed, discouraged the legal rights and entitlement of any of its employees to join any union of their choice including the claimant. On this account, the respondent asked the Court to dismiss the suit with costs.
4. During the trial which proceeded on March 7, 2023, both sides called oral evidence.



Claimant's case

5. The claimant called oral evidence through Mr. Wilson Onduto, who testified as CW1. Mr. Onduto produced the documents filed on behalf of the claimant as exhibits before Court.
6. It was his evidence that the Union wrote a letter to the respondent on March 1, 2016 and May 15, 2016 requesting access to its premises so as to recruit members. The respondent received the letter but refused to stamp it. On May 18, 2016, the union officials visited the respondent's premises to recruit members but they were arrested by the police and taken to the Industrial Area police station.
7. Mr. Onduto further stated that the respondent arrogantly refused to allow its employees join the claimant union. It was his further testimony that Mr. Oduor from the union once again tried to access the respondent's premises to recruit members but he was not allowed to do so. Further, the union wrote another letter to the respondent on June 13, 2016 requesting to enter its premises. The respondent received the letter but declined the union's request. The respondent was further requested access through the union's letter dated July 27, 2016 but once again, it declined to grant access.
8. Mr. Onduto further testified that the Union cannot select a shop steward without first recruiting members. He added that even if a shop steward was to be selected, he or she risked being terminated from employment.

Respondent's case

9. The respondent called oral evidence through Mr. Jorum Onege, who testified as RW1. He identified himself as the respondent's Human Resource Manager and at the outset, sought to adopt his witness statement to constitute his evidence in chief.
10. It was Mr. Onege's testimony that union membership is voluntary and the claimant's allegations that the respondent has denied its employees the right to join the union is not true for the reason that: -
 - a. There are no unionisable employees in the respondent's employment;
 - b. Membership to a union is a constitutional right that must be exercised and cannot be presumed by the claimant;
 - c. There is no shop steward referred by the claimant amongst the respondent's staff; and
 - d. The respondent has never been consulted or involved in any negotiations with the claimant, therefore it is unconstitutional for the claimant to impose any right or obligations upon the respondent without free will and or concurrence.
11. RW1 further stated that access to its premise is not absolute as the claimant's officials are required to produce their credentials in order to be allowed access to the respondent's premises. That the claimant in its pleadings, has not stated any name of its official who was denied access after proper identification.
12. He further stated that the letters produced by the claimant do not indicate that it was denied access to the respondent's premises at any time.
13. RW1 further stated that the claimant has not adduced evidence to support the allegations that the respondent's employees have been denied their freedom to join the union.



Submissions

14. The claimant submitted that the workers of the respondent have been denied their constitutional right to join the union of their choice according to section 4 of the *Labour Relations Act* and articles 36 and 41(c) of the *Constitution*.
15. On the respondent's part, it was submitted that the claimant has failed to prove that it received the alleged letters. That the letters produced by the claimant do not indicate that the union was denied access to the respondent's premises at any time. In support of the respondent's submissions, the case of *Kenya Private Universities Workers Union v Mt. Kenya University* (2021) eKLR was cited.
16. The respondent further urged that the claimant is abusing the court process by attempting to obtain a court order prior to demonstrating that any access has been denied. On this score, the court was invited to consider the determination in the case of *Kenya Private Universities Workers Union v Management University of Africa* (2021) eKLR.

Analysis and determination

17. Flowing the pleadings, the evidence and the opposing submissions, it is evident that the issue in dispute is access to the respondent's premises by the claimant union for purposes of membership recruitment.
18. The relevant provision in this case is section 56 of the *Labour Relations Act*, which gives a trade union a statutory right to access an employer's premises for purposes of promoting its activities and programs.
19. Whereas the claimant avers that it made numerous unsuccessful attempts to access the respondent's premises, the respondent opines otherwise and maintains that it has never denied the claimant access to its premises.
20. In support of its case, the claimant exhibited copies of three letters addressed to the respondent. From the said letters, it is apparent that the claimant was requesting to be allowed to meet with the employees of the respondent at proposed dates and time. The respondent has denied receiving the claimant's letters. In response to the respondent's assertions, the claimant stated that the respondent refused to acknowledge receipt of its letters.
21. From the record, it is not possible to truly ascertain for a fact, the claimant's assertions that it was denied access to the respondent's premises. I say so because besides the letters exhibited by the claimant, there is no other evidence to prove that the union was denied access to the respondent's premises. In this regard, the claimant did not for instance adduce evidence in whatever form or manner to prove that the respondent chased the union officials from its premises and caused them to be locked up at the police station.
22. Suffice to say, the letters exhibited by the claimant do not constitute concrete evidence to prove denial of access by the respondent.
23. On this issue I will follow the determination by Rika J in the case of *Kenya Private Universities Workers Union vs Management University of Africa* [2021] eKLR where the learned Judge reckoned that: -
 - “ 17. There is no evidence that access has been denied. The claimant has written letters formally asking the Respondent to facilitate meetings with Unionisable Employees, at the Respondent's premises. The Respondent has not facilitated such meetings.



18. The Court does not think that failure in facilitating such meetings, amounts to denial of access. The Claimant Union has not been locked out from the Respondent's premises. The Respondent has failed to organize meetings between its Employees and the Claimant Union. It has not closed its gates upon the Claimant."
24. That finding notwithstanding, I gather from the respondent that it is not averse to the claimant accessing its premises. Its only contention is that it has never denied the union access to its premises and has never received its letters to that effect.
25. Testifying under cross examination, RW1 acknowledged the provisions of section 56(2) of the Labour Relations Act with regards to the rights of an employer in granting a trade union to access to its premises.
26. The aforesaid section 56(2) is couched as follows: -
- An employer may—
- (a) impose reasonable conditions as to the time and place of any rights granted in this section to avoid undue disruption of operations or in the interest of safety; and
 - (b) require officials or trade union representatives requesting access to provide proof of their identity and credentials.
27. The import of the above provision is that access to the employer's premises may be granted with reasonable restrictions.
28. In light of the foregoing, I find no reason to decline the prayers sought by the claimant. I have further considered the fact that the respondent will not suffer any prejudice in the event the orders sought are granted. Accordingly, the court makes the following orders: -
- a. The respondent is hereby directed to allow the claimant access to potential members in its premises for purposes of recruitment subject to the same taking place outside official working hours or if during working hours, the same should not interfere with the operations of the respondent.
 - b. The officials or trade union representatives of the claimant requesting access to the respondent's premises to provide the respondent with proof of their identity and credentials.
 - c. There shall be no order for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

STELLA RUTTO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

