



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenya Plantation Agricultural Workers Union v Flowers (Cause
E019 of 2023) [2023] KEELRC 1713 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E019 OF 2023
HS WASILWA, J
JULY 12, 2023**

**BETWEEN
KENYA PLANTATION AGRICULTURAL WORKERS UNION APPLICANT
AND
PRIMAROSA FLOWERS RESPONDENT**

RULING

1. Before me for determination is the applicant's Notice of motion dated March 6, 2023, filed pursuant to Article 41 of the Constitution, Section 49 of the Labour Relations Act and all other enabling provisions of the law, together with the inherent powers of the Court, seeking for the following Orders; -
 1. Spent.
 2. Spent.
 3. The Applicant be compelled by this Honourable Court to deposit the sum of Kenya Shillings Three Million (Kshs 3,000,000) that was deducted from Union member's salaries but not remitted to the Applicant's Account.
 4. An order directing the Respondent to pay from its funds union dues arrears and any other unremitted dues to the Claimant's Account from the date of the hearing to the date of the Judgement.
 5. The Respondent has failed to remit union dues that it is deducting from the Applicant's Union members' salaries.
 6. This Court to issue an urgent interpartes hearing for the determination of this suit.
 7. Costs of this Application be provided for.



2. The Applicant is based on the fact that the Union has a collective Bargaining Agreement(CBA) with the Respondent. The Respondent has been deducting union dues from the Applicant's members and has refused to remit them from August, 2022 to date accumulating to a tune of Kshs 1,400,000.
3. The Respondent has also failed to settle union dues arrears for the period between 2019-2022 of Kshs 1,600,000 despite receiving several reminders. Their action has thus financially embarrassed the Union, when it is in need of funds to effectively carry out its union activities.
4. The applicant is apprehensive that the Respondent refusal to remit the union dues will affect the rendering of services to its members, that may force members to resign from the Union. Further that the refusal to remit union dues is in breach of the Law and the Collective Bargaining Agreement.
5. The Application is also supported by affidavit of Thomas Kipkemboi, the Applicant's Secretary General. He reiterated the contents of the application and in addition stated that there is an existing Memorandum of Understanding (MOU) for payment of the Union arrears and the Refusal by the Respondent to pay is in breach of clause 1 of the CBA and section 49 of the Labour Relations Act. He added that several attempts have been undertaken by the applicant, including conciliations but the issue has remained unresolved.
6. He reiterated the need to have the application heard expeditiously and orders granted failure to which the suit will be rendered nugatory.
7. The Application is opposed by the Respondent that filed a replying affidavit sworn on March 27, 2023 by Charles Kiamba, the Respondent's Accountant. The Affiant herein stated that all union dues that were deducted from the Applicant's members have been remitted to the Applicant's Union.
8. He stated that the amounts remitted to the Union between August, 2022 and March, 2023 both for COTU members and KPAWU members are Kshs 553,200 and Kshs 851, 432.46 respectively. While the Union dues remitted for the period between 2019 and 2020 are Kshs 2,160,116.19 and Kshs 2,742,178.93 respectively, which were remitted through bank transfers and cheques in full payment of the Union dues, as such nothing is owing to the Union.
9. It is his case that the Applicant has failed to disclose all material facts before this Court and stated that the parties herein agreed by consent of July 22, 2022 on payment of arrears and the Respondent issued several postdated cheques, all amounting to Kshs 2,400,000 which was to clear all the arrears with the last cheque maturing on January 20, 2023. Therefore, that the application herein is in abuse of Court process and aimed at prejudicing the Respondent. He added that none of the said cheques was dishonored, therefore the Applicant has received all the Union dues arrears in full and the Application herein is misconceived.
10. Application herein was canvassed by written submissions with the Applicant filing on June 8, 2023 and the Respondent filed on June 13, 2023.

Applicant's Submissions

11. The Applicant submitted on three issues; whether the applicant is entitled to the orders sought, whether the Respondent acted in good faith and who should bear costs of this suit.
12. On the first issue, it was submitted that the Respondent has failed to remit the union dues it collected from its members from August, 2022 to date and have also failed to remit arrears for the period between 2019-2020 which now has accumulated to Kshs 3,000,000, in total violation of section 19(4) of the Employment Act. He argued that the payment summary table in the Respondent's replying affidavit is misleading since those were payments in arrears for the month of June and July, 2022 and not dues



from August, 2022 which remain unpaid to date. He states that the replying affidavit is misleading this Court and should be struck out.

13. It was submitted that the Respondent ought to have annexed the list of all the paid up members for the period it was in arrears. He maintained that the dues sought in the Application are outstanding and urged this Court to compel the Respondent to remit the same.
14. On costs, it was submitted that cost is awarded on unfettered discretion of the Court and following event. Therefore, that having established their case, they urged this Court to allow the Application and award them costs of this Application.

Respondent's Submissions.

15. The Respondent submitted on three issues; whether the Respondent remitted union dues for unionisable employees for the period between August, 2022 to March 6, 2023, whether the Respondent paid Union dues arrears for the period between 2019-2020 and June, 2021 to March, 2022 and whether the Applicant is entitled to the orders sought in the Application.
16. The Respondent submitted that they have remitted all the union dues they deducted from the union members as illustrated in their replying affidavit. It was argued that the decline in union dues received was informed by its reduced work that arose as a result of Covid-19, that led to reduction of its work force by 318 employees, who were sent on unpaid leave, that affected the amount to be remitted to the Union. Infact that Annexure TK-5 attached to the Applicant supporting affidavit, is a testament to the reduced workforce at the Respondent's employ.
17. The Respondent submitted that the sum of Kshs 1,600,000 sought by the Applicant is not supported by any evidence on how the said figure was arrived at as is mandated under Section 107, 109, 112 of the *Evidence Act*, therefore their claim should be disallowed. On the contrary, that the Respondent has produced evidence of payment made for each month via RTGS transfers. To support this argument, they relied on the case of *Mbutia Macharia V Annah Mutua and another* [2017] eklr where the Court held that;-

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.”
18. Similarly, that the prayer for remittance of 3 milion as Union dues is not supported by any evidence from the Applicant. The Respondent on the other hand has tabled evidence before this Court showing how the said Union dues were remitted to the Applicant.
19. The Respondent submitted further that the arrears for the period between June, 2021 to June, 2022 was subject of Court proceedings in Nakuru ELRC Cause number E022 of 2022 where the parties compromised the Application and entered into a consent of July 22, 2022 and agree on payment plan, which Respondent issued postdated cheques on full payment of the said arears. Being that no evidence was brought before the Court suggesting that any of the cheques was dishonor, the said payments were made in full settlement of the said arrears. Also that the Union dues are up to date and nothing is owing to the Applicant.
20. The Respondent also submitted that the request made for the filling of updated members list was done in submissions stage and not in the pleadings as such the same should be rejected by this Court as stated in *Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 others* [2014] eklr where the Court relied on a decision by the supreme Court of Nigeria in Adetoun Oladeji



(Nig) Ltd Vs. Nigeria Breweries Plc S.C. 91/2002, where Judge Pius Aderemi J.S.C. expressed himself as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

21. In conclusion, the Respondent submitted that it has demonstrate to this Court that it has remitted all union dues and urge this Court to find this Application unwarranted, misleading, vexatious and a waste of Court time and proceed to dismiss it with costs.
22. I have examined all the averments and submissions of the parties herein. The applicant has submitted that they have not received the money apparently deducted from their union members.
23. The applicant even indicate that they recorded a consent with the respondent on this money but the respondents have not still paid up.
24. The applicant union exhibited APP GK4 entered between the union and the respondent dated July 16, 2021 where it was agreed that the respondents were to pay some money to the union at dates indicated. The MOU indicates that the union was owed 3.6m and the same was to be paid by March 2022 as per the schedule therein.
25. The respondents indicate that the union dues deducted from members were paid accordingly between August 2022 and March 2023.
26. They indicate they remitted kshs 2,160,116.19/= between 2019 and 2020 kshs 2,742,178.93/= for the COTU and KPAWU respectively remitted through bank transfer.
27. As indicated above, the MOU indicated kshs.3.6M was owed to the respondent as at July 16, 2021. This shows that the money if paid by the respondent was before the MOU signed on July 16, 2021.
28. It is important that the respondents show how they have paid this amount between August 2022 and March 2023 as indicated.
29. They aver that they paid kshs 2,400,000/= to the respondents as per consent dated July 22, 2022 through last cheques maturing on January 20, 2023.
30. From the documents produced by the respondents, some money were paid to the respondents but then the respondents have not demonstrated that the money due were all paid up.
31. In my view, this matter can only be resolved through a sit down by the parties to reconcile their figures which I now order as per Section 15 (4) of the ELRC Act.
32. The matter is referred back to the parties for a conciliation process under the supervision of the County Labour Officer.
33. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 12TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:-

Chacha holding brief for Odinga for Respondent – present

Mbakhila for Claimant – present

Court Assistant - Fred

