



Kenya Engineering Workers Union v Thorlite Kenya Limited (Cause E338 of 2023) [2023] KEELRC 2229 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2229 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E338 OF 2023
SC RUTTO, J
SEPTEMBER 27, 2023**

BETWEEN
KENYA ENGINEERING WORKERS UNION APPLICANT
AND
THORLITE KENYA LIMITED RESPONDENT

RULING

1. By way of an notice of motion application dated April 26, 2016, the applicant moved this court seeking the following orders and declarations:
 - a. Spent
 - b. That the respondent be forthwith restrained from victimizing their employees for joining the union and participating in union activities and be ordered to reinstate employees who have been illegally suspended and terminated.
 - c. That the respondent be compelled to deduct and remit union dues to the applicant/ claimant as per section 48 of the *Labour Relations Act*, 2007.
 - d. That this court be pleased to grant any order that it may deem fit and just to grant.
 - e. That the costs of the application be borne by the respondent.
2. The Application is supported by the affidavit sworn on April 26, 2023 by Mr. Wycliffe Nyamwatta who describes himself as the General Secretary of the applicant. Mr. Nyamwatta avers that in March, 2023, the applicant recruited into its membership a total of 17 employees of the respondent. That on 15th March, the applicant wrote to the respondent demanding deduction of union dues in line with section 48 of the *Labour Relations Act*. That they also enclosed a Recognition Agreement for the respondent to review in preparation for signing and as a precursor to collective bargaining on the new terms and conditions of employment of their members.



3. Mr. Nyamwatta further avers that the respondent wrote back on April 17, 2023, declining to recognize the applicant for purposes of collective bargaining and indirectly refusing to deduct union dues. That on April 17, 2023, he wrote to the Cabinet Secretary for Labour, registering a trade dispute. According to Mr. Nyamwatta, the respondent soon thereafter started victimizing employees for joining the union including fabricating incidences and unprocedurally taking unwarranted disciplinary action against them. He is apprehensive that the respondent will terminate all employees thus denying them their constitutional right to join of their choosing and denying the union freedom of association.
4. In opposing the Application, the respondent through a Replying Affidavit sworn by Mr. Atul Patel on May 3, 2023, admits that the applicant recruited into its membership some of its employees who according to its records, were 17 in number. He deposes that the respondent upon receiving the applicant's correspondence in relation to their demands, it requested for time to analyze, review and understand what the Recognition Agreement entailed. That before the respondent could give its feedback, the applicant applied undue pressure by sending its officers to its employment premises who were always issuing threats of taking his passport so that he would be unable to leave the country and deporting him, if the company does not agree to their demands.
5. Mr. Atul further avers that at no particular point in time did the respondent deny the applicant any right to engage with its members within its premises. That they abused this privilege by constantly harassing and threatening the respondent's staff if their demands were not actuated.
6. He contends that fair labour practices does not only apply to the applicant but equally applies to the respondent who should not be subjected to threats and intimidation of sorts by anyone in the name of actualizing their labour rights. He is alive to the provisions of article 41 of *the Constitution* guaranteeing every worker the right to form and join a trade union of choice and do so without any form of victimization. He maintains that this right does not entail the employer condoning misconduct by workers in their pursuit of having a Recognition Agreement.
7. He further states that the threshold to entitle one for a Recognition Agreement with the company is clearly expressed to be simple majority and this is fifty plus one. That in the respondent's analysis, the applicant has recruited 17 out of 39 employees and this does not meet the simple majority threshold as envisaged by the *Labour Relations Act* of Kenya. This was well communicated to the applicant through a letter dated April 17, 2023 and this does not amount to refusal to sign a Recognition Agreement with them.
8. Mr. Atul maintains that in pursuit of the Recognition Agreement with the respondent, the applicant should not be allowed to curtail, prevent and cripple its operations by condoning all forms of misconduct and simply preventing them from taking disciplinary action against such.
9. In response to the respondent's replying affidavit, the applicant filed a further affidavit sworn by Mr. Nyamwatta in which he deposes that the respondent's request for time to "analyze, review and understand what the recognition agreement entailed", was a deliberate effort to delay acceding to the applicant's demands, and to give the respondent time to devise a way to victimize its unionisable employees who had joined the union. That the respondent instituted the so-called disciplinary measures against the applicant's members around the same time they responded to the demand for recognition and deduction of union dues through a check off system. He contends that some of the alleged offences had taken place over two months earlier and no such action had been contemplated against them.
10. He further avers that the disciplinary action taken against some of the staff was as a direct result of their membership to the applicant union. He reiterates that the respondent engaged in acts of victimization.



11. Mr. Nyamwatta further denies that the applicant's officers ever, in any way harassed, threatened or intimidated the respondent or any of its directors or staff. That the applicant at no time sent its officers to the respondent's premises for any business, save to deliver/reply to correspondence, or on an invitation by the respondent for a meeting.
12. He further deposes that in seeking to recruit members from the respondent's employees, the applicant did so outside work hours and outside the respondent's premises, in a just and fair manner, aimed at promoting industrial relations spirit between the parties. This did not require or necessitate any request to seek permission to enter the respondent's premises.
13. Mr. Nyamwatta further agrees that genuine disciplinary action is acceptable but contends that in this particular instance, the so-called disciplinary action was not genuine and smirks of victimization.
14. He further states that the applicant has met the threshold for recognition, as the respondent had in its employment a total of 24 employees, 17 of whom were union members, at the time the applicant demanded recognition.
15. In a rejoinder, the respondent filed a Further Affidavit sworn on June 14, 2023 by Mr. Atul Patel in which he avers that there was immense pressure being applied to the respondent's Managing Director to attend a meeting and sign the Recognition Agreement through a number of letters and unfriendly visits by union representatives. That the union representatives attended the respondent's Kampala road and Bondo road premises to deliver the letters and it is on those occasions that he also delivered threats and intimidations.
16. He further denies that the disciplinary action was for acts that had taken place much earlier. He avers that the acts had taken place in the week prior for absenteeism and an adequate opportunity to provide an explanation was provided before formal action.
17. The Application was canvassed by way of written submissions. Both parties filed written submission which I have considered. It is notable that both parties heavily submitted on the question of recognition which is not an issue for hearing and determination at this juncture. From the face of the Application, it is evident that the orders sought are twofold, namely:
 - i. Deduction and remittance of union dues; and
 - ii. Victimization of the respondent's employees on account of their union membership and participation in union activities.
18. Ideally, the above constitute the issues for determination at this point. Therefore, the question of recognition is reserved for hearing and determination in the main suit.

Deduction and remittance of union dues

19. The respondent has not contested that the applicant recruited into its membership some of its employees. According to the applicant, the respondent refused to deduct and remit union dues as required under Section 48 of the *Labour Relations Act*. In support of its case, the applicant exhibited a copy of a letter dated March 16, 2023 addressed to the respondent's Managing Director, requesting for deduction and remittance of union dues from the employees it had recruited into its membership.
20. The applicant further exhibited a copy of Form S constituting the notice and authority to deduct union dues from the employees who have acknowledged membership to the Union.
21. On its part, the respondent did not deny receiving the letter from the applicant as well as Form S. It is noteworthy that the respondent has not given reasons why it has failed to deduct and remit union



dues from the wages of the employees who have acknowledged membership to the applicant Union. Its only contention was that it required more time to consider the Recognition Agreement presented by the applicant. As I have stated, the issue of recognition is not for hearing and determination at this juncture.

22. As it is, no evidence was exhibited contradicting the willingness of the respondent's employees to join the applicant Union.
23. *The Constitution* and the *Labour Relations Act* acknowledges and guarantees freedom of association, which includes the right of an employee to belong, or not belong to a trade union.
24. In this regard, the right to form, join or participate in the activities and programmes of a trade union is guaranteed under article 41(2) (c) of *the Constitution*. Connected to this, article 36 (1) of *the Constitution* guarantees freedom of association in the following manner:
 - (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
25. Section 4 (1) of the *Labour Relations Act* is one of the ways through which the above Constitutional provisions have been given effect.
26. Applying the above constitutional and statutory provisions to the case herein, it is clear that the right of the respondent's employees to join the applicant's membership is guaranteed and is inviolable.
27. Payment of union dues by members, is an obligation that goes hand in hand with the right to join a trade union. In this regard, section 48(2) and (3) of *Labour Relations Act* provides that: -
 - (2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to: -
 - (a) deduct trade union dues from the wages of its members; and
 - (b) pay monies so deducted: -
 - (i) into a specified account of the trade union; or
 - (ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.
 - (1) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.
28. To this end, once an employee is recruited to a union and signs a check off form, an employer is required to commence deduction and remittance of union dues for the recruited employee within 30 days of being served with the said check off forms.
29. It should be further noted that section 48(3), is in mandatory terms hence it is not upto the employer to elect whether or not to comply.
30. Accordingly, the respondent is mandated to effect deductions of union dues from the applicant's members and remit the same to the applicant's gazetted bank account.



Whether there is a case of victimization of the applicant’s members on account of their union membership

31. It is the applicant’s case that the respondent victimized employees who had joined its membership. According to the applicant, the disciplinary action against some of the respondent’s staff was taken as a direct result of their union membership. The applicant further stated that the respondent was searching for historical instances of indiscipline for which to discipline its members thus pointing to victimization and unfair treatment. The applicant specifically cited the disciplinary action against Gideon Wesonga, David Mutinda and Alex Nungu. The applicant further stated that some members of staff who were absent were not cited for absenteeism and no action was taken against them.
32. These assertions have been refuted by the respondent who has argued that the employees’ right to join the union does not entail condoning misconduct by workers. The respondent further contends that all disciplinary measures taken by the respondent was carried out without any malice or ill intention on its part.
33. In support of its position, the respondent exhibited copies of warning letters and notices to show cause issued to Gideon Wesonga, David Mutinda and Alex Nungu.
34. Considering the rival positions taken by the parties with regards to this issue, it is apparent that the same can only be resolved following a full hearing where the evidence presented by either side will be tested in cross examination. As it is, it is not possible to conclusively find whether the disciplinary processes commenced against the three employees was genuine disciplinary action against errant employees or whether the same was as a result of their union membership.
35. Be that as it may, I wish to underscore that victimization of an employee on account of their union membership is a direct violation that goes to the root of article 41 of *the Constitution* and the constitutional right to associate under article 36 of *the Constitution*. As I have stated herein, this is an inviolable right that cannot be taken away. Further, such victimization is a grave matter and is to be frowned upon and should not be left to stand. In this regard, an employee who wishes to join a union should not be subjected to any form of harassment, victimization and intimidation.
36. That said, the right to associate and join a trade union should not be misconstrued as a through pass by employees to engage in any form of misconduct at the workplace.

Order

37. In the final analysis, the court allows the Application dated April 26, 2023 in the following terms:
 - a. The respondent do forthwith commence deductions and remittance to the applicant’s gazetted bank account, dues from the employees who have duly signed Form S and acknowledged union membership to the applicant union.
 - b. Pending the hearing of the main suit, the court confirms its orders of April 27, 2023 and the respondent is restrained from victimizing any of its employees on account of their union membership or participation in union activities.
38. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2023.

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STELLA RUTTO



JUDGE

Appearance:

For the Claimant/applicant Mr. Namasake

For the respondent Ms. Owenga

Court assistant Abdimalik Hussein

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

