



**Kenya Building Construction Timber and Furniture Industries Employees
Union v Midland Emporium Limited (Employment and Labour Relations Claim
1 of 2023) [2023] KEELRC 2197 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2197 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CLAIM 1 OF 2023**

**JW KELL, J
SEPTEMBER 21, 2023**

BETWEEN
**KENYA BUILDING CONSTRUCTION TIMBER AND FURNITURE
INDUSTRIES EMPLOYEES UNION CLAIMANT**
AND
MIDLAND EMPORIUM LIMITED RESPONDENT

JUDGMENT

1. The Claimant brought suit on behalf of the grievants against the respondent vide memorandum of claim dated 3rd August 2015 and filed in court on the 10th August 2015 at Kisumu which file was later transferred to this jurisdiction. The Claimant sought the following reliefs against the Respondent: -
 - a. A declaration that the termination of employment of the 22 grievants by the respondent was unlawful.
 - b. Kshs, 1,410,753/- being collective terminal dues for all the grievants.
 - c. 12 months' salary for each grievant as compensation for the unlawful termination of employment.
 - d. Issuance of certificate to each grievant.
 - e. Costs of this claim.
2. The Claimant in addition on even date filed verifying affidavit sworn on the 3rd August 2015 by Francis Karimi Murage the General Secretary, Claimant's list of documents of even date and the bundle. The claimant further filed witness statements of the grievants on the 31st January 2019 and further list of documents dated 7th February 2022 being 5 gate passes.



3. The Respondent filed Memorandum of defence dated 25th April 2016 together with bundle of documents through the law firm of Gabriel Fwaya Advocates. On the 20th June 2022, witness statement of Divyesh Kotecha dated 2nd June 2022 was filed together with list of documents dated 2nd June 2023.

The Claimant's case

4. The Claimant's case was heard on the 12th July 2023 with CW1 as Luke Anyama Makokha and CW2 Alfred Musiai Okito testifying on oath and being cross-examined by counsel for the Respondent. On 22nd May 2023, CW3 George Mbwagi, CW4 Hamiri Munira, CW5 Kassim Chibete Wetaba and CW6 Tobias Odhiambo Mukoya all testified on oath and were cross-examined by counsel for the respondent and the Claimant closed their case. The witnesses relied on their witness statement and their copies of gate passes.

The Respondent's case

5. The Respondent's case was heard on 22nd May 2023 where its witness Divyesh Kotecha (DW) testified on oath. He stated he was the General Manager of Midland Emporium Kakamega Limited and had no association with the Respondent company. The witness produced as his evidence exhibits D-1-4. That they were served with the documents and notified the Claimant that they were not associated with the respondent as stated in paragraph 6.2 and 9.2 of the statement of defence. The witness was cross-examined by counsel for the claimant and the defence case closed.

Claimant's case in summary

6. The Claimant union case was as per the Memorandum of Claim and the witness statements of 6 grievants who testified. The 7th witness was stood down for being a stranger in the proceedings.
7. The Claimant stated that the 22 grievants were its members having been paying union dues. That the grievants were engaged on different dates and were all terminated on the 12th August 2012. That they had not negotiated a CBA. That their services were terminated on signing up to be union members(FKM1 check off forms by the grievants all dated 31st August 2012). That efforts to settle the matter at conciliation failed(at page 49 of the claimant's bundle was the certificate of unresolved dispute).

The Respondent's case

8. The Respondent's case was that the alleged grievants were never its employees and that they worked for a third party which DW stated meant they were not their employees. The witness DW before the court stated they were served and that is why they instructed advocate. They produced CR12 as proof that there existed two companies and that witness came from Midland and Emporium (Kakamega) Limited and not the Respondent company whose directors were disclosed with address in Kisumu. The Claimant did not file any evidence to rebut the defence witness statement.

Written submissions

9. The court gave directions for filing of written submissions after the hearing. The parties complied. The claimant's written submissions were drawn by Claimant union General Secretary Francis k. Murage and were dated 29th June 2023. The Respondent's written submissions were drawn by Fwaya, Masakhwe Were & Advocates were dated 12th July, 2023.



Determination

Issues for determination.

10. The Claimant identified the following issues for determination in the dispute:-
 - a. Is the respondent wrongly sued by the Claimant
 - b. Were the grievants employees of the respondent
 - c. Were the terminations of the grievants fair.
11. The Respondent adopted the issues identified by the Claimant.
12. The court having considered the dispute, the evidence and the parties having agreed on the issues adopts the said issues framed by the claimant with slight modifications for determination of the dispute thus:-
 - a. Whether the Claimant was competent to bring the claim
 - b. Was the Respondent wrongly sued by the Claimant
 - c. Were the grievants employees of the Respondent
 - d. Were the terminations of the grievants from employment fair.
 - e. Whether the Claimant is entitled to reliefs sought.

Issue (a). Whether the claimant was competent to bring the claim

13. The Claimant is a union. It brought the claim on behalf of 22 grievants who it stated were its members and further had been paying union dues. The Claimant only has jurisdiction over its members. The Respondent denied this claim in paragraph 3 of its defence. The Claimant had a legal burden to prove the alleged 22 grievants were its members failing which it had no locus standi to bring the suit. The Claimant relied on check off forms signed by the 22 grievants and marked FKM-1(pages 13 to 22). The notice authorising deductions was dated 31st August 2012. The notice to employer was dated 31st August 2012. The signatures were indicated to be of 31st July 2012. That was the evidence of payment of dues. During the cross examination, CW1 told the court he was paying dues to the union and he had forgotten his card. He did not answer how he paid the dues. CW2 told the court he joined the union on 31st July 2012. CW3 admitted the union notice was dated 31st August 2012(pages 14-22) and he was terminated on 12th August 2012 and was not paying dues to the union. CW4 on cross-examination told the court the union picked names on 12th August 2012 and that he did not pay any dues to the union and further he did not ask the union to make deductions. CW5 stated he joined the union in 2012. CW6 stated he was stopped from work for joining the union and further he did not instruct on deductions.
14. The right of representation of a party by the union is granted under section 22 of the *Employment and Labour Relations Act* to wit:- ‘22. Representation before the Court. In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee, specially authorised for that purpose.’ Justice Rika In a decision relied on by the Claimant of *Kenya Hotels and Allied Workers Union v Diani Sea Resort T/A Carslake Nominee Limited* (2015)eKLR interpreted the representation by the union as follows:-



- ‘ 6. Legal representation of individual Employees in Court and other Dispute Resolution Platforms is an obligation of the Trade Union, imposed by the Trade Union Constitution. It is a right of the Employee, which flows from his individual Membership of a Trade Union, normally guaranteed through the Trade Union Constitution. It is an aspect of the right to associate under the Constitution of Kenya.
7. Section 22 of the [Industrial Court Act](#) 2011 grants Trade Union Representatives the right to represent their Members in Court.”

The germane issue for the court to determine is whether the said 22 grievants were members of the claimant. The burden of proof lay with the claimant for asserting they were its members paying dues. The payment of dues is the proof of membership. The evidence relied on was a notice of deduction dated 31st august 2012 and all the witnesses in court admitted they had neither paid dues or instructed the claimant to deduct the dues. In essence they also disowned the alleged checklist with their names and signatures.”

15. I do uphold the ruling by Rika J in the Diani Sea Resort(supra) to effect that the right of trade union representation of employees in court flows from the membership. There was communication with conciliator leading to certificate of unresolved trade dispute. The conciliator did not sit hence had no opportunity to address the membership of the grievants with the Claimant. It is the finding of the court there was no proof of membership of the alleged 22 grievants with the Claimant union. The lack of membership means the Claimant had no *locus standi* to bring the claim on behalf of the said persons who were not its members. Section 48(1) of the [Labour Relations Act](#) provides for trade union dues as the condition for union membership to wit:- ‘In this Part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.”
16. The claim is thus moot for being brought by a stranger.

Issue (b). Was the respondent wrongly sued by the Claimant

17. The issue was addressed by both parties. The Claimant sued Midland Emporium Ltd with address in Kakamega. The Respondent in paragraph 2 of its Statement of Defence admitted being a duly registered company but denied dealing in building and construction.
18. DW stated their company based at Kakamega was served and they instructed counsel to file defence. His company was Midland Emporium(Kakamega) Limited. D-exhibit 1 and 2 were CR12 for both companies. The court opines CR12 is conclusive evidence of the registration details of a company under the [Companies Act](#).
19. The issue as framed is answered in the affirmative DW had no business instructing counsel to enter defence if it denied to be the respondent. DW company called Midland Emporium(Kakamega) Limited could have protested receipt of service and filed replying affidavit as they had not been sued. The Claimant relied on the gate pass as proof of employment which was issued by Mumias Sugar Company Limited as entry permit for contractor’s employees, the Contractor was indicated as simply ‘Midland’. The court agreed that the employee’s claim cannot be defeated for misnaming employer as held in [Kenya Hotels and Allied Workers Union v Diani Sea Resort T/A Carlake Nominee Limited](#) (2015)e KLR , “The Claim cannot fail on the ground that the Respondent is misnamed. This Court has on many occasions pointed out that Employees cannot be closed out from pursuing their Claims on the ground that they have given Court the wrong description, of the business and legal structures which constitute their Employers. Employees hardly know what these capacities are, and what the



Employers' business and legal structures are. Frequently, Businesses are structured in ways that are meant to avoid regulatory burdens, such as taxes and labour regulations. They have multiple layers of business and legal forms". The claimant union failed to undertake diligence on the respondent status.

20. Consequently, the court finds no issue with the naming of the Respondent. The only issue is whether the case was defended as DW whose company was served produced evidence that though he was served his company was different. It is trite law a company is a legal entity and thus DW had no capacity to defend the case. The issue having come up and CR12 having been filed the Claimant ought to have served the suit on the actual Respondent.

Issue (c). Whether the grievants were employees of the respondent

21. Having held the case was not defended as the right party was not served, the court is without basis to determine whether the alleged grievants were employees of the Respondent. Midland as stated in the gate pass is not the same as Midland Emporium Limited which is a known legal entity as per the CR12. The Claimant erred in failing to serve the sued party to elicit response.

Issue (d). Whether the terminations of the grievants from Employment was fair.

22. He who asserts a fact has the burden to prove as stated in section 107 of the *Evidence Act* to wit:- '1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'
23. What was the evidence presented? 5 work permits. The work permits indicated dates of the permit to work at Mumias by workers of the contractor from various period. The dates being 11/07/12 to 11/08/12, 07-08-12-02-09-12, 17-07-12 to 17-08-12, 30-07-12 to 19-08-12, 17-07-12 to 17-08-12. From these documents which were copies and not even certified nevertheless prove that the grievants were workers for a time specific project at the premises of Mumias Sugar. This was not an employment which would attract the statutory rights of leave. The grievants told the court they were paid wages per day rates. The court sampled the relevant period wages order and finds on balance of probability the grievants were casual workers for a time bound project and were compensated as per the wages order.
24. Consequently, the claim fails on two folds for lack of membership of the grievants with the claimant hence incompetent and moot and further for lack of merit on balance of probabilities.
25. Since the Respondent was not served as DW denied being the respondent, I dismiss the claim with no order as to costs.
26. Right to appeal in 30 days
27. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST SEPTEMBER 2023.

JEMIMAH KELI,

JUDGE.

In the presence of:-

Court Assistant : Lucy Macheso

For Claimant: 2 of the Grievants present



For Respondent:- none

For Midland Emporium (Kakamega) Ltd- Ms. Masakhwe

