



Kenya Union of Commercial Food and Allied Work v Mitra Enterprises Limited & another (Cause 62 of 2020) [2023] KEELRC 2122 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 62 OF 2020
CN BAARI, J
SEPTEMBER 21, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

MITRA ENTERPRISES LIMITED 1ST RESPONDENT

MALIWA WORKFORCE SERVICE 2ND RESPONDENT

RULING

1. This ruling relates to the Respondents' motion dated 30th May, 2023 and filed on 8th June, 2023. The motion is brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. The Applicant/Respondents seek the following orders:
 - i. Spent
 - ii. That the Honourable Court be pleased to compel the Respondent/Claimant to file an affidavit on the employees the Respondent is representing and who are said to be part of the union and who have expressed willingness to have their union dues deducted from their salaries as further affidavits to the Respondents/Applicants application dated January, 2023.
 - iii. That in the alternative the Respondent/Applicant be compelled to avail in court the said recruited members of the union for confirmation by the Court of their union membership at the hearing of the Respondent/Applicant's application dated 11th January, 2023.
 - iv. That the costs of this application be provided for.
2. The motion is supported by grounds on the face of the motion and the affidavit of one Pravin Prajapati. The motion is premised on the assertion that the Applicant has not recruited a simple majority of the Claimant/Respondent's employees for there to be recognition and has not recruited more than 5 of



- the Applicant's employees for the deduction of union dues to be effected per judgment delivered in this matter.
3. The Applicant further avers that the recruited members of the Claimant union do not want their dues deducted from their salaries and that the Claimant/Respondent is misleading the Court in its application dated 11th January, 2023.
 4. It is the Applicant's further assertion that the true position of the Claimant's union membership under their employ, it is necessary that the Claimant/Respondent files sworn affidavit of the employees it has recruited.
 5. The Claimant/Respondent opposed the motion vide a replying affidavit dated 19th June, 2023.
 6. Parties urged the motion orally on 11th July, 2023, where the Mr. Wangoda for the Applicant argued that the Claimant purports to represent non-existent members which carries the risk of the Court issuing a judgment that is incapable of compliance.
 7. It is Mr. Wangoda's further argument that only 13 out of the 16 employees recruited are still in the employ of the Respondent/Applicant, and only 3 of them have accepted that deductions be made in respect of union dues.
 8. Mr. Macharia appearing for the Claimant/Respondent herein, submitted that this Court had already rendered judgment, wherein, it found the Respondents now Applicant, bound to deduct and remit union dues as a consequence of its 16 employees having been recruited to the service of the Claimant/Respondent.
 9. It is Counsel's further submission that Section 48 of the *Labour Relations Act*, 2007, provides a check-off form, through which an employer is mandated to deduct dues from its employees' salaries on account of union dues. He submits that it is only through the check-off form that employers are authorized to deduct and remit union dues, and once the check-off form is executed, an employer is legally bound to deduct the dues.
 10. It is further submitted for the Claimant/Respondent that an affidavit is not by law recognized for purposes of union dues deductions, and that any intended withdrawal is guided by law.
 11. The Claimant/Respondent argues that the Court is functus officio on the issue of the number of employees having already determined the issue. He placed reliance in the case of *Leisure Lodges Limited v Japhet S Asige & another* [2018] eKLR to buttress the doctrine of functus officio.
 12. Mr. Macharia finally submits that having admitted having 13 employees in their service who are members of the Claimant/Respondent's union, it is only prudent that the Applicant proceeds to effect the deductions.

Determination

13. I have considered the motion, the grounds in support, the replying affidavit in opposition and the oral submissions by both parties. The issue for determination is whether the Applicant/Respondent is entitled to the reliefs sought.
14. The grounds upon which this motion is premised is clear indication that the Applicant/Respondent is seeking review of the Judgment and decree of this Court through the back door or at worse, for the Court to sit on appeal in its own judgment.



15. This Court in its judgment rendered on 9th December, 2021, had already made a finding that the Claimant had met the threshold having recruited more than 5 members in the employ of the 1st Respondent, and consequently entered judgment for the Claimant compelling the 1st Respondent to henceforth deduct union dues from the salaries of the current and future members of the Claimant's union and remit the deductions to the Claimant/Respondent's account.
16. To now raise the same issues under the instant application, is to say the least, an abuse of the process of the Court.
17. An employer is not expected to line up employees and ask them one after another, who wishes to have union dues deducted from their salaries. The law is clear on how such consent is obtained, and it is not in the employer's place to require the employees to grant further consent once the form is duly executed by the employee and submitted to the employer by the union.
18. By Counsel for the Applicant/Respondent's own admission during the oral hearing, the Applicant has currently a total of 13 employees in their service that are members of the Claimant. The requirement by law is just 5 employees, and which position the Court in its judgment had already made a finding on. In *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (Kudbeiba) v British Army Training Unit Kenya* [2015] eKLR, where Mbaru J held:

“..... Under section 48 of the Labour Relations Act, an employer is bound to remit all union dues deducted to the union account irrespective of recognition as under this part, where there are more than 5 employees in the membership of a union, the employer should make deductions and remit to the union. The deduction and remittance of union dues from employees who have acknowledged union membership should be based on the Minister for Labour making an appropriate order through Kenya Gazette indicating the account to which such union dues should be remitted. It does not require a recognition agreement between a union and an employer. The duty on the union is to submit to the employer the names and identity card numbers of the employees through the check-off forms. This is not contested as the Respondent has complied in this regard.”
19. In the upshot, I find the Applicant/1st Respondent's motion lacking in merit, is vexatious and a clear abuse of the court process, and is hereby dismissed with costs to the Claimant/Respondent.
20. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF SEPTEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Miheso Present for the Applicant/1st Respondent

Mr. Muunda Present for the Claimant/Respondent

N/A for the 2nd Respondent

