



**Kenya National Union of Domestic Workers v United Aryan EPZ Limited & 3 others
(Cause E788 of 2021) [2023] KEELRC 2780 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2780 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E788 OF 2021
MA ONYANGO, J
OCTOBER 31, 2023**

BETWEEN

KENYA NATIONAL UNION OF DOMESTIC WORKERS CLAIMANT

AND

UNITED ARYAN EPZ LIMITED 1ST RESPONDENT

AFRICAN APPAREL EAST AFRICA LIMITED 2ND RESPONDENT

ROYAL GARMENTS INDUSTRIAL EPZ LIMITED 3RD RESPONDENT

TAILORS AND TEXTILES WORKERS UNION 4TH RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the *Labour Relations Act* to represent employees in the domestic sector as more specifically captured in the membership clause of its constitution.
2. The 1st, 2nd, 3rd and 4th Respondents are all limited liability companies engaged in the manufacture of textiles for export at the Export processing Zones.
3. The 5th Respondent is a trade union registered under the *Labour Relations Act* to represent employees in the tailoring and textiles sector.
4. In the memorandum of claim dated 21st September 2021 the Claimant avers that the employees of the 1st, 2nd, 3rd and 4th Respondents were intimidated and under duress, forced to join membership of the 5th Respondent without signing check off forms. That having been dissatisfied by services rendered by the 5th Respondent the employees resolved to resign from membership of the 5th Respondent en-mass and joined the membership of the Claimant by signing check off forms copies of which the Claimant attached to the Memorandum of Claim as annexure 2 to the Memorandum of Claim.



5. It is the averment of the Claimant that despite the employees resigning from membership of the 5th Respondent and notifying the 1st to 4th Respondents of the said resignations for the purpose of stopping deduction and remittance of union dues to the 5th Respondent, the 1st to 4th Respondents have refused to stop the said deductions in favour of the 5th Respondent contrary to the mandatory provisions of the law.
6. It is the Claimant's averment that the Respondents embarked on intimidation, victimization and threats to its members some of whom were dismissed un-procedurally for associating with the Claimant union and engaging in union activities with the Claimant. That the un-procedural dismissals are subjects of other suits in which the 1st to 4th Respondents have been cited in contempt proceedings.
7. It is the Claimant's averment that the Respondents are in violation of Articles 36 and 41 of the Constitution of Kenya, ILO Conventions 87 and 98, section 48 and 54 of the Labour Relations Act and section 19 of the Employment Act.
8. The Claimant has set out the issues in dispute as follows:
 1. The refusal by the Respondents to stop the deductions of the trade union dues from the salaries of the applicant members who had resigned from the membership of the 5th Respondent and proceeding to remit them to the said 5th Respondent despite the said members' resignations.
 2. Refusal by the Respondents to deduct and remit trade union dues to the applicant account as directed of them by the grievants herein all having complied with the strict requirements of the law with respect to the section 48 of the labour relations act, and despite the instructions in writing to so act in accordance to the section 19 of the employment act 2007.
 3. The refusal by some of the respondents to arrange to sign the recognition agreement with the applicant trade union herein despite the applicant having recruited the said respondents simple majority for purposes of recognition agreement in accordance to the section 54 of the labour relations act 2007.
9. The Memorandum of Claim was filed together with a notice of motion under certificate of urgency in which the Claimant sought the following orders-
 1. That:- the matter be certified urgent and That the application be heard urgently and ex-parte in the first instance.
 2. That;- the application be served upon the parties and That an earlier inter-pates hearing date be set.
 3. That:- the Application be consolidated with the Cause Nairobi ELRC E-320 OF 2021.
 4. That the Respondents be and are hereby directed to forthwith commence deducting and remitting Trade Union Dues to the Applicant Trade Union Account Number 011207XXXXX900 domiciled at the Cooperative Bank of Kenya Aghakan Walk Branch P O Box 500300 Nairobi.
 5. That the Respondents be and are hereby directed to forthwith, arrange to sing Recognition Agreement with the Applicant subject to the fulfilment by the applicant of the conditions precedent.
 6. That costs of the application be in the course.



10. The application was placed before me on 23rd September 2021 and upon considering the matter in chambers in the absence of the parties, I realized that it was a demarcation dispute and had not been reported to the Minister for Labour as provided under section 62 of the *Labour Relations Act*.
11. Section 15 of the *Employment and Labour Relations Court Act* empowers this court to refer matters to the Minister where the suit has been filed directly to the court. The section provides-
 15. Alternative dispute resolution
 - (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of *the Constitution*.
 - (2) (Deleted by Act No. 18 of 2014, Sch.).
 - (3) (Deleted by Act No. 18 of 2014, Sch.).
 - (4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration
12. Upon considering the application by the Claimant I made the following orders suo motu:

The suit herein which from the pleadings is a demarcation dispute has been prematurely filed in Court without first being subjected to conciliation as required by both the *Employment and Labour Relations Court Act* and the *Labour Relations Act*.

The suit is in accordance with Section 15 (4) of the *Employment and Labour Relations Court Act*, referred to the Labour Commissioner to appoint a Conciliator.

The report of the Conciliator to be filed in Court within 30 days.
13. The Minister appointed Hellen Maneno as conciliator. Upon hearing oral submissions and considering written submissions from the parties and the Registrar of Trade Union, the conciliator prepared a report dated 18th January 2022 which was filed in court.
14. The findings and recommendations of the conciliator are reproduced below:

Findings

From the submissions above by the parties, the following are my findings: -

1. Both the claimant and the 5th respondent are duly registered Trade Unions under the *Labour Relations Act* as confirmed by the Registrar of Trade Unions (Interested Party)
2. The 5th Respondent (Tailors and Textile Workers Union) has valid Recognition Agreements and duly registered Collective Bargaining Agreements (CBA's) with the 1st 2nd, 3rd and 4th respondents.
3. The 1st, 2nd 3rd and 4th respondents are all garment making companies within the Export Processing Zone (EPZ) which fall under the Export Processing Zone Authority Kenya which vide a letter ref no. EPZA/ADM/27/015 dated 12th November 2021 addressed the Cabinet Secretary for Industrialization, Trade and Enterprise Development raising their concern about the Industrial Relations in the companies as a result of the activities of a union which has



no mandate to recruit employees in the garment making sector. They further requested the Cabinet Secretary for Labour to intervene.

4. On 26th March 2016, the claimant union made an application for Registration of the union to the Registrar of Trade Unions pursuant to section 12 (1) of the [Labour Relations Act](#).
5. Vide a letter dated 9th April 2018, the Registrar declined the registration of the union giving reasons as to why the registration was declined.
6. The claimant filed an Appeal at ELRC at Bungoma in Appeal no. 1 of 2018 against the Registrar's decision not to register the union.
7. On 31st May 2019, Hon Justice Mathew N. Nduma issued a Court order quashing the Registrar's decision not to register the union and further ordered the claimant to restrict its representation to domestic workers employed in private family houses, and not in any commercial and/or public establishments whether designated as homes or otherwise. The Hon. Judge further ordered that before registration of the claimant union is done, their constitution was to be reviewed to ensure this restriction is adhered to.
8. The Claimant vide a letter ref no. 2/KNUDOW/MM/RT-8/21 dated 15th September 2021 wrote to the Registrar of Trade Unions to effect Registration of changes to the name of the union and [the constitution](#) as agreed during the Claimants' Special Delegates Conference. The new name adopted by the delegates was Kenya National Union of Domestic Workers, Medical Training Institutions and Garments Staff.
9. Vide a letter ref no. ML&SP/TU/186/1/33 dated 16th September 2021, the Registrar of Trade unions wrote to the Claimant indicating that any attempt to change [the constitution](#) to expand the scope of representation beyond what the Court ordered in Appeal cause no. 1 of 2018 will be tantamount to disobedience of the order and thus contempt of a lawful Court order.
10. As a result of the Registrar's decision in (9) above, the C/laimant union has filed an Appeal at the Court in Bungoma in Appeal No. E014 of 2021 that was scheduled for mention on 17th January 2022.
11. Upon scrutiny of the check-off lists and the alleged mass resignation notices submitted to the 1st, 2nd, 3rd and 4th Respondents, several discrepancies are quite apparent. Here below are a few of the discrepancies;
 - a. On page 284 of the bundle of documents submitted by the claimant, the document is a notification to the 3rd respondent, Royal Garments EPZ Ltd of the employees' resignation from TTWU. Entry at no. 3 is for one Millicent Sumba id no. 24298379 who resigned on 25th March 2021. The same employee appears on the resignation list on page 271 entry no. 5 but the signatures are different and she resigned on 24th March 2021.
 - b. The notification of the resignation is written by the same person. Furthermore the entries on page 210 (check off list) and the entries on page 251 for notification of resignation appear in similar sequence from entry number 1 to number 14.
 - c. Check off list signed on 19th March 2021 entry no. 4(Titus Mutamba Waomba) submitted to the 1st respondent (Aryan EPZ Ltd). The said employee died on 25th October 2020 as confirmed by burial permit serial no. DA 1453602 dated 29th October 2020.



- d. Hesborn Sakwa page 33 entry no. 23 is repeated on page 43 entry no. 6. This is the same person with different identity number and signatures. Brenda Naliaka resigned from United Aryan (EPZ) Ltd vide a resignation letter dated 6th February 2020 yet her name and signature appear on page 32 entry no. 5 signed on 19th February 2021 as having resigned from TTWU.
12. The Claimant has not availed a gazette notice issued pursuant to section 48 (2) of the Labour Relation Act which provides as follows:-

"A trade union may in the prescribed form request the Minister to issue an order directing an employer of more than 5 (five) employee belonging to the union to deduct Trade Union dues from the wages of its members".

13. The Claimant has not provided any check-off lists or resignation list pertaining to the 4th respondent (New Wide Apparels EPZ Ltd) which raises the question — why is the company listed as a respondent?
14. Section 48 (6) provides as follows: -

"An employer may not make any deductions from an employee who has notified the employer in writing that the employee has resigned from the union"

Section 48 (8) further provides that

"An employer shall forward a copy of any notice of resignation he receives to the Trade Union".

The law envisages that the employee shall write to the employer as an individual of his/her resignation from the union not as a group. What the claimant has provided is a list bearing names of employees purporting to have resigned from TTWU.

From the findings above, it is apparent that the claimant has no locus standi to represent employees of the 1st, 2nd, 3rd and 4th respondents as they are already ably represented by the 5th respondent who has a valid Recognition Agreement and negotiated CBA's with them.

The Honourable Judge in Appeal no. 1 of 2018 was very categorical that: -

"The claimant was to restrict it's representation to domestic workers employed in private family houses and not in any commercial and/or public establishment" ...' the Honourable Judge further ordered that before registration of the Union is done, their constitution was to be reviewed to ensure this restriction is adhered to.

For the claimant to call a special delegates conference to change their constitution to include other sectors is in bad faith and tantamount to disobeying a lawful Court Order.

The findings in paragraph 11 borders on fraud. How does a person who died in 2020 sign a document in 2021? How did the claimant obtain the deceased's identity number? This incident goes to support the respondent's assertion that the claimant could have fraudulently obtained printouts and copied the same on the check-off forms.

This is further buttressed by the fact that the check off forms and purported resignation notices are in the same handwriting.



Furthermore, Appeal no. E014 of 2021 has not been determined, therefore the claimant cannot purport to have recruited employees in garment making industries.

Recommendations

From the findings above, I recommend that the claimant desist from purporting to represent employees of 1st, 2nd, 3rd, and 4th respondents as they are already represented by Tailors and Textile Workers Union — the 5th respondent in this matter.

The claimant demand for union dues is not sustainable due to the glaring discrepancies in the check-off lists and notices of resignation and also their failure to apply to the Minister for an order to deduct union dues.

The 1st, 2nd, 3rd and 4th respondent should continue to remit union dues to the 5th respondent

From the findings above, I recommend that the Claimant desist from purporting to represent employees of the 1st, 2nd, 3rd and 4th Respondents as they are already represented by the Tailors and Textile Workers Union-the 5th Respondent in this matter.

The Claimant demand for union dues is not sustainable due to the glaring discrepancies in the check off lists and notices of resignation and also their failure to apply to the Minister for an order to deduct union dues.

The 1st, 2nd, 3rd and 4th Respondent should continue to remit union dues to the 5th Respondent.

15. On 20th January 2022, the court directed the parties to file submissions on the conciliator's report. Only the Claimant and 3rd Respondent confirmed filing submissions. The submissions of the other parties are not on record. Submissions of the Claimant are dated 1st February 2022 and the 3rd Respondent's submissions are dated 2nd February 2022.
16. According to the Claimant, *the Constitution* of Kenya affirms the workers right to join, form and or associate with the lawful activities of any registered association. It is further the Claimant's submission that it is the workers who resigned from the 5th Respondent and by their own volition elected to join the membership of the Claimant by signing the Form S, the Check-off forms in accordance with the law.
17. The Claimant urged the court to direct the Respondents to deduct and remit to the court the monies deducted from the workers who have signed resignation letters until the issue is determined.
18. The 3rd Respondent on its part submits that it has a valid recognition agreement with the 5th Respondent which represents the interests of the employees working for the 3rd Respondent and all workers employed in the tailoring and textiles industries.
19. Rule 5 of the Claimant union's constitution provides for membership as follows:
 - a) Membership of the union shall be open to all persons employed at private family houses, estates, homes, flats, apartments, bar attendants in any of the following capacities; cook, househelps, homes old age, children, nurses, cleaners, gardeners or garden labourer- caretakers, drivers and watchmen provided that such members shall not be employees who have registered membership of any other trade union.
20. In its Appeal No. E014 of 2021 against the decision of the Registrar of Trade Unions to register changes in its constitution and to change its name and expand the unions representation to cover persons employed in medical training institutions and garment staff, the court held as follows:



38. The 1st and 2nd Respondents submit that the Appellant's rights under Article 36 and 41 (2) of *the Constitution* are subject to Limitation under Article 24 of *the Constitution* and the 1st Respondent's decision to refuse the Appellant's resolution of 14th September 2021 was justifiable limitation of the Appellants' rights and made pursuant to court judgement in Bungoma ELRC Appeal No. 1 of 2018 and secondly the proposed constitution subject sought to represent was sufficiently represented by other unions and further the proposed changes did not seek to represent a specific sector but sought to add other sectors to its already registered union. To buttress its submission the 1st and 2nd Respondent rely on decision in Kenya Public Schools Non – Teaching Staff (KEPUS NTESU) -VS- Registrar of Trade Unions & Another where it was held :-
- “ It is therefore inappropriate to introduce constitutional amendments in what is purely are policy and administrative issues. Indeed Articles 36 and 41 of *the Constitution* read together protects the freedom to form and join the trade union of ones choice. However the exercise of this freedom is not absolute. It must be exercised in cognizance and conformity with the policies and best practices in the Labour movements. Limitation of the right to form and join a Union of one's choice in recognition of policies and best practices which have been tested over time is reasonable and justifiable in opine and democratic society”.
39. The court adopts the above decision with approval save to add that is not open to this court to amend the decision in Bungoma ELRC APPEAL NO. 1 OF 2018 and allow expansion of the scope of the Appellant. The court finds no basis of the allegation of violation of Articles 36 & 41 of *the constitution* of the alleged prospective members in the letter dated 16th September 2021 by the 1st Respondent.
21. The purpose of a union's constitution is to limit the scope of the unions activities to those authorised in its constitution. In this case the union can only recruit from the sector delineated by its constitution. It therefore means that the union has no capacity to recruit members outside its constitution.
22. Section 54(8) of the *Labour Relations Act* provides;
- When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.
23. Section 4 of the *Labour Relations Act* recognizes that freedom of association is subject to *the constitution* of the union. The section provides-
- 4.
- (1) Every employee has the right to –
 - (a) participate in forming a trade union or federation of trade unions;
 - (b) join a trade union; or
 - (c) leave a trade union.
 - (2) Every member of a trade union has the right, subject to *the constitution* of that trade union to –
 - (a) participate in its lawful activities;



- (b) participate in the election of its officials and representatives;
 - (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and
 - (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to *the constitution* of that federation to –
- (a) participate in its lawful activities;
 - (b) participate in the election of any of its office bearers or officials, and
 - (c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.

24. From the foregoing, it is my finding that the Claimant has no capacity to recruit employees of the 1st to 4th Respondents. The purported recruitment of the employees of the 1st to 4th Respondents by the Claimant is therefore without jurisdiction.

25. For these reasons I find no merit in the Claimants case against the Respondents with the result that the same is dismissed with costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER, 2023.

M. ONYANGO

JUDGE

