



**Kenya Private Universities Workers Union v Al Jamea Tus Saifiyan Campus Nairobi
(Cause 668 of 2019) [2023] KEELRC 2560 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2560 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 668 OF 2019
J RIKA, J
OCTOBER 19, 2023**

**BETWEEN
KENYA PRIVATE UNIVERSITIES WORKERS UNION CLAIMANT
AND
AL JAMEA TUS SAIFIYAN CAMPUS NAIROBI RESPONDENT**

JUDGMENT

1. The Claimant filed its Statement of Claim on 8th October 2019.
2. It avers that it is a registered trade union, representing the private universities sector. According to the Claimant, the Respondent is a registered university of Pakistani origin, based at Nairobi, Kenya.
3. The Claimant avers that it recruited 242 Unionisable Employees of the Respondent, in the months of July and August 2019.
4. The Claimant subsequently forwarded check-off forms with regard to the recruited Employees, requesting the Respondent to deduct and remit trade union dues, in accordance with section 48 of the *Labour Relations Act*.
5. The Respondent did not comply, and the Claimant reported the existence of a trade dispute to the Ministry of Labour, on 2nd August 2019.
6. The Respondent failed to submit to the conciliation process, and the Conciliator issued a certificate of unresolved dispute, paving the way for the Parties to approach the Court for adjudication.
7. The Claimant seeks Judgment against the Respondent for: -
 - a. Access to the Respondent's premises to recruit members.
 - b. Compliance with section 48 of the *Labour Relations Act*.



- c. Restraint of the Respondent, from victimizing its Unionisable Employees, on account of their association with the Claimant.
 - d. Recognition, and subsequent negotiation and execution of a Collective Bargaining Agreement.
 - e. Any other suitable order.
 - f. Costs.
8. The Respondent's reply, is that it is not a private university. It is not a tertiary institution. It is not a college. It is a religious organization, registered under the Ministry of Education, to offer basic education under the IGCSE curriculum. It does not offer tertiary education. It exhibits its certificate of registration for basic education institutions, granted by the Ministry of Education. The Claimant therefore, does not have the mandate to represent Respondent's Unionisable Employees.
 9. Majority of the Employees listed in the check-off lists, which the Respondents states it first saw in the bundle of documents filed by the Claimant in Court, are not Employees of the Respondent. They are outsourced from other companies, including Protective Custody Limited. The Respondent exhibits outsourcing agreements with various manpower firms, in support of this proposition.
 10. Only 64 of the 242 Employees allegedly recruited by the Claimant, are actual Employees of the Respondent. They have denied subscription to the Claimant. The other Employees are outsourced, and offer cleaning and security services. The Respondent denies that it victimized any Employee on account of their association with the Claimant.
 11. The record indicates that the Claimant made an application for interim measures, fashioned in similar mode to the substantive prayers. The application, dated 8th October 2019 [filed simultaneously with the Statement of Claim] sought the following measures: -
 - a. [spent].
 - b. [spent].
 - c. Prohibitory order, restraining the Respondent and her agents from victimizing the Unionisable Employees of the Respondent, on account of their association with the Claimant.
 - d. Prohibitory [?] order against the Respondent to comply by mandatory provision of the law [Section 48 of the [Labour Relations Act](#)], by deducting and remitting trade union dues.
 - e. Any other suitable order.
 12. Through a ruling dated 19th December 2019, the Court [Ongaya J], made the following findings: -
 - I. The Parties agree that the Claimant's constitution, allows the Claimant to recruit Employees from the private universities sector.
 - II. The Respondent is registered as a basic education institution.
 - III. The Respondent however, described itself in the agreement for provision of security services, and in its replying affidavit, as Al Jamea Tus Saifiyah University.
 - IV. There was no reason to find that the Claimant was not the appropriate trade union to represent Employees of the Respondent.
 - V. There was no evidence to show that 178 Employees in the check-off lists were outsourced.



- VI. The Claimant had established that it is the right union to represent Employees of the Respondent.
- VII. Employees are not to be victimized for associating with a trade union of their choice.
- VIII. Union dues were to be deducted and remitted from Employees who had joined the trade union, and there would be no prejudice to the Respondent.
13. It was ordered: -
- a. Prohibitory order is issued restraining the Respondent and/or its agents from victimizing its Employees on account of their association with the Claimant.
 - b. The Respondent to comply with the mandatory provision of the law [Section 48 of the *Labour Relations Act*] by way of deducting and remitting trade union dues from salaries of Employees who had signed check-off forms.
 - c. Parties to seek compromise of the Claim, failing which the Parties to schedule the Claim for full hearing.
14. Although the Claimant Union has acted through its General Secretary, from the inception of the Claim, strangely, there was a Notice to Act In Person, dated 16th June 2023, filed by the General Secretary Peter Owiti. The Court does not understand why the General Secretary filed this Notice.
15. The record indicates that Parties have not voluntarily settled the Claim, as advised by the Court above. The Claimant filed various applications after the ruling, including an application for contempt of court, and another seeking to execute by way attachment and sale of the Respondent's assets, for arrears of trade union dues, calculated at Kshs 4,315,299. The Claimant obtained warrant and proclaimed against the Respondent's goods. The Respondent states that Parties determined the payable amount is Kshs 481,485, which the Respondent had paid to the Claimant.
16. On 28th September 2022, the Claimant scheduled the Claim for mention before the Court, but Mr. Owiti and Mr. Odongo for the Claimant were not able to articulate the purpose of the mention, and the Court gave them time, re-scheduling mention for 1st November 2022.
17. On 1st November 2022, Mr. Owiti appeared in the presence of Mr. George Masese from the Federation of Kenya Employers, representing the Respondent. The Respondent informed the Court that it was in compliance with the orders of the Court, and was remitting trade union dues. The Claimant concurred that it was receiving trade union dues, and Parties were looking at the possibility of a full compromise.
18. On 1st December 2022, the Claimant's tone changed. It alleged that there was a decree granted by the Court, for payment of Kshs 4,315,299 by the Respondent to the Claimant, in arrears of trade union dues, and that the Respondent had defaulted. The decree was allegedly made by the Court, on 5th July 2022. The Respondent insisted that mention was to confirm if the Respondent was remitting trade union dues. The Respondent confirmed that it was indeed in compliance. The Claimant admitted that the Respondent had been paying trade union dues by way of cheques, adding rather obliquely, "but without by-product."
19. On 14th February 2023, Mr. Masese appeared in Court in the absence of the Claimant's representative. He informed the Court that Parties had agreed on the way forward, and the latest cheque of Kshs 100,000, had been drawn by the Respondent in favour of the Claimant. The sum in arrears according to the Respondent, stood at Kshs 481,485. The Respondent informed the Court that Parties were



engaging further, and asked for one last mention before the Court, to record a full consent, which was scheduled for 24th March 2023.

20. On 24th March 2023, both Parties were represented. The Claimant insisted that there was no payment by the Respondent, and that it should be allowed to execute. The Respondent's position was that payment was being made continuously. The Court granted Parties 30 days to settle, in default the Claimant be at liberty to execute orders made on 19th December 2019. The order for execution, was subsequently stayed to allow Parties engage further. On 27th June 2023, Mr. Owiti told the Court that the Claimant had received about Kshs 500,000 from the Respondent.
21. The last mention was a month later, on 25th July 2023, when Mr. Owiti told the Court that negotiations had broken down, and the Court should proceed to make a final Judgment, based on the submissions, documents and pleadings filed by the Parties, in accordance with Rule 21 of the [E&LRC \[Procedure\] Rules, 2016](#).

The Court Finds: -

22. After the ruling granted by the Court, to the Claimant on 19th December 2019, the Claimant has done little to prosecute the Claim in full, as contemplated in the ruling.
23. All focus by the Claimant, has been on the monetary aspect of the temporary orders granted in the ruling, and from 2019, no steps have been taken by the Claimant Union, to establish that it has recruited a simple majority of the Respondent's Unionisable Employees, and that it merits recognition, to pave way for collective bargaining. There have been no active measures taken by the Claimant, to prosecute the substantive dispute.
24. Unfortunately, the Claimant Union appears to have translated grant of interim measures, as an end to the substantive dispute it presented before the Court, and has been comfortable for over 4 years, to hang onto the grant of the interim monetary relief, and to seek the application of the coercive powers of the Court against the Respondent, through contempt and other execution proceedings, whenever the Respondent was deemed to have failed or delayed, in payment of the monthly trade union dues. All other substantive issues have been relegated to the back burner. The Court has in effect, been turned into a trade union dues collecting agent, from 2019, with the Claimant inviting the Court at every turn, to supervise the deduction and remittance of trade union dues in its favour. Every cheque drawn by the Respondent in favour of the Claimant, has been made the subject of a mention date, or an application for approval, or enforcement, before the Court. The prayers for interim orders on payment of trade union dues, are frequently abused by Parties, with no desire shown, to go into the substantive dispute, once the interim measures are in place. The Court is frequently called upon to enforce payment for every passing month, to supervise compliance, and to take stern action against a defaulting Employer on a monthly basis. This trend falls in the category of practices, that are clearly in abuse of the court process. The duty of the Court, its *raison d'être*, must be in the final resolution of disputes, not in supervising partial settlement of disputes as they arise. If trade union dues are to be claimed, the amounts due must specifically be pleaded from the outset, specifically proved, and must be pegged to a specific duration. An order or decree of the Court for payment of trade union dues, cannot be issued in perpetuity. A liquidated claim ought to be placed before the Court, tied to a specified period, and specifically proved. Where and when, did the Claimant obtain a Judgment against the Respondent, for the sum of Kshs 4,315,299? The Court should not serve as a collecting agent for a trade union, where outstanding dues for every month, subsequent to an interim order that an Employer deducts and remits trade union dues, is enforced by the Court through multiple applications for execution.



25. The Claimant obtained warrants and proclaimed against the Respondent's assets, for a sum of Kshs 4,315,299, alleged to arise from a decree dated 5th July 2022.
26. There is no such decree on record, and the amount of Kshs 4,315,299 stated to be the decretal sum, is entirely of the Claimant's own creation.
27. There was no such amount pleaded in the Statement of Claim, or granted in the ruling dated 19th December 2019, or in the orders made on 5th July 2022.
28. There was no such decree drafted by the Claimant, forwarded to the Respondent for approval, and approved by the Respondent, before endorsement by the Court for execution, in accordance with established execution procedures.
29. The orders made on 5th July 2022 [not decree], arose from the Claimant's application dated 27th May 2022. The executable prayers sought in the application dated 27th May 2022 in main, were: -
 - a. Leave is granted to the Claimant to institute contempt proceedings.
 - b. Mr. Zofb Nurdin Akbarali, be summoned before the Court to show cause why he should not be jailed for a period of 6 months.
 - c. The Administrator is cited for contempt.
 - d. The Inspector General of Police or authorized agent, to assist in enforcement of court orders.
30. Prayer 6 of the application, where the Claimant mentioned the sum of Kshs 4,315,299, was not framed as an executable prayer, and should never have been the foundation of any order, decree, execution proceedings, interim or final.
31. It is worded as follows: -

“That on May 2022, the applicant wrote a reminder to the Respondent demanding remittance [for] trade union dues from months of January 2020 to April 2022, amounting to Kshs 4,315,299, and thereafter...”
32. The last word, ‘thereafter,’ is left hanging, supporting the view by the Court, that in the mind of the Claimant, interim measures granted for payment of trade union dues, issued in perpetuity, and every time the Respondent was deemed in default, the Claimant could approach the Court, and seek execution orders for recovery, on a monthly basis.
33. This explains why the Claimant has not prosecuted the main dispute.
34. The application was not opposed, and the Court simply stated that the application is not opposed, and is granted. Obviously, what was granted, would only be the prayers that were capable of execution, not an order inferred from the Claimant's general statement, explaining that the Claimant had sent out a reminder to the Respondent, about payment of trade union dues. If the application was granted in the absence of the Respondent, un-opposed, it was limited to execution by way of contempt proceedings, as was prayed by the Claimant. It was not open to the Claimant to read orders into the pronouncement made by the Court, and proceed to extract a non-existent decree for execution of the colossal ‘decretal sum’ of Kshs 4,315, 299. If leave is granted to institute contempt of court proceedings, a party granted such leave, is not allowed to simultaneously execute by way of attachment and sale of the Judgment Debtor's property. One form of execution must be exhausted, before the other can be resorted to. The Claimant obtained leave to institute contempt of court proceedings against the officers of the Respondent, and should not have pursued attachment and sale of the Respondent's property



- simultaneously, even before the summoned officers had appeared before the Court, and given their word on the purported judgment debt. Execution process, which was stayed by the Court, was clearly in abuse of the process of the Court.
35. The statement at paragraph 6 of the prayers, was not a statement that could result in an executable decree or order, and any order or decree alleged to have been founded on the statement, is illegal, null and void, and not capable of enforcement. How does a letter of reminder written by one party to another, become a decree of the Court? How does an amount computed solely by one litigant against the other, become a decree of the Court?
 36. At no time did the Court make a finding upon trial, to the effect that the Respondent owed the Claimant the sum of Kshs 4,315,299. Decrees of the Court are made after trial of the facts, and after findings have conclusively been made by the Court.
 37. The pleadings, documents and submissions filed by the Parties do not establish that the Claimant has recruited a simple majority of the Respondent's Unionisable Employees, to warrant recognition by the Respondent.
 38. It was not shown, that 242 Employees, said to have been recruited by the Claimant, was out of any specific number of Unionisable Employees, of the Respondent. The strength of the total labour force, was not established. No percentage of the whole unit, was pleaded by the Claimant, or established by evidence. No Employee has given evidence before the Court, establishing their membership of the Claimant Union. The outsourcing agreements exhibited by the Respondent, and the Respondent's position that outsourced Employees who were in the majority, were not its Employees, have not substantively been discounted by the Claimant. About 60 Employees wrote a letter exhibited by the Respondent as 'ZK5,' terming the check-off lists submitted by the Claimant including their names, as fake. These Employees should have been presented before the Court by the Claimant, to shed light on their membership of the Claimant.
 39. Although the Court found that there was prima facie evidence that the Respondent had referred to itself as a university in some of its pleadings, there was no conclusive evidence given by the Claimant to discount the certificate exhibited by the Respondent issued by the Ministry of Education, showing that the Respondent is an institution registered to offer Basic Education, and is not a tertiary institution. It was for the Claimant to establish, beyond the prima facie findings, that the Respondent is a private university, registered as such in Kenya, whose Unionisable Employees can be represented by the Claimant. It was incumbent upon the Claimant, to show that the Respondent is a university, established in Kenya, through the Commission for University Education, in accordance with the Universities Regulations 2014. Reference to the Respondent as a university, could have been made with other institutions related to the Respondent, located outside Kenya, in the mind of the Respondent. Final determination of a dispute cannot be founded on prima facie evidence, and preliminary findings of the Court on an application for interim measures.
 40. There is no evidence that the Claimant attempted to access, and was denied access, to the Respondent's premises, for purposes of recruitment of members. If the Claimant recruited 242 members from the Respondent, it must have had reasonable access to the Employees, if not their place of work. There is no justification for the prayer concerning access to the Respondent's premises.
 41. There is no evidence to warrant the prayer on negotiation and execution of a Collective Bargaining Agreement.
 42. The Claimant filed this Claim, obtained what appeared to be favourable interim measures, and was contented with pursuit of those interim measures, for as long as possible. There is no indication on the



record, that the Claimant made any effort, to pursue the full dispute on trade union dues, recognition and collective bargaining, whose determination would have assisted the Parties, in establishing whether they are in, or should enter into a labour relationship, creating rights and obligations, which are justiciable, calling for protection and/or enforcement of the Court.

43. The interim measures granted by the Court, in the ruling dated 19th December 2019, cannot be confirmed without full and conclusive evidence adduced by the Claimant. The Court does not have evidential material, adequate to justify confirmation of any of the interim measures granted on 19th December 2019.

It Is Ordered:

- a. The Claim is dismissed.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 19TH DAY OF OCTOBER 2023.

JAMES RIKA

JUDGE

