



**Kenya Union of Commercial, Food and Allied Workers v Mr Price
Retail Kenya Limited (Employment and Labour Relations Cause
E114 of 2022) [2023] KEELRC 2540 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2540 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E114 OF 2022
K OCHARO, J
OCTOBER 19, 2023**

BETWEEN

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

AND

MR PRICE RETAIL KENYA LIMITED RESPONDENT

RULING

Background

1. The Claimant/Applicant filed a Notice of Motion dated 15th February 2022 brought under Certificate of Urgency seeking the following orders: -
 - a. Spent
 - b. That the Honourable Court does issue interim orders restraining the Respondent from victimizing, intimidating, coercing, harassing, discriminating, terminating or disciplining the Claimant/Applicant's members whose names appear in the check-off forms pending hearing and determination of the suit.
 - c. That the court does issue interim orders directing the Respondent to commence deducting and remit union dues of all employees who have signed check-off forms acknowledging union membership.
 - d. That the Honourable Court does issue orders directing the Respondent to recognize the Claimant/Applicant and sign the recognition agreement.
2. The Respondent opposed the Notice of Motion through a Replying Affidavit sworn on 21st February 2023 by one Mondli Trevor Mchunu.



3. The Claimant/Applicant filed submissions dated 16th November 2022 in support of their Notice of Motion application. The Respondent subsequently filed response submissions dated 24th April 2023.
4. Further, the Claimant filed Supplementary Submissions dated 6th March 2023; and the Respondent filed Further Submissions dated 24th April 2023.

Claimant's Application.

5. The Claimant/Applicant's bone of contention with the Respondent is that the Respondent has refused to Recognize them as the trade union representing its workers despite the Claimant/Applicant having recruited more than a simple majority of its workers, as required by Section 54 of the [Labour Relations Act](#) No. 14 of 2007. The Claimant/Applicant states that they recruited 88 members from among the Respondent's employees, out of a total of 125 unionisable employees, and forwarded the duly executed check-off forms to the Respondent.
6. The Claimant/Applicant complains that despite meeting the threshold set out by Section 54 of the [Labour Relations Act](#) No. 14 of 2007, the Respondent has obstinately failed to recognize them, sign a Recognition Agreement with them, enter into a Collective Bargaining Agreement with them on behalf of the union's members, and deduct the union dues from the employees and remit the same to the Claimant/Applicant.

Respondent's case

7. The Respondent's position is that they have never harassed any employees who have joined the membership of the Claimant/Applicant union.
8. Further, they state that they have not recognized the Claimant/Applicant simply because the said Claimant/Applicant has not achieved the simple majority envisioned by Section 54 of the [Labour Relations Act](#) No. 14 of 2007 in respect of union membership. Upon carrying out a verification exercise among their employees, they found that as at January 2023, only 53 employees, out of 125, were willing to join the Union.
9. The Respondent asserts that they can only effect deductions of employees' salaries and make remittances to the Claimant only after the execution of a recognition agreement and authorization from the Minister. Thirteen of its employees have expressly instructed it to refrain from deducting union dues from their salaries.
10. The Respondent is categorical that they have always been willing to meet with the Applicant, but the Applicant has not recently reached out to them. The Respondent states that no interim orders should be granted as there are some disputed issues which can only be settled after the hearing of the substantive suit.

Claimant's submissions and Supplementary Submissions

11. The Claimant submits that under Articles 36(1) and 41 (2) of the [Constitution of Kenya](#) 2010, every person has the right to freedom of association, and every worker has the right to form, join and participate in the activities and programs of a trade union. This is buttressed by [ILO Convention No. 87](#) and [98](#).
12. It is submitted further that in order to attain recognition, a trade union must recruit a simple majority of unionisable employees, pursuant to Section 54 (1) of the [Labour Relations Act](#) No. 14 of 2007. That this position was affirmed in the cases of [Kudbeiba v British Army Training Unit](#) [2015] eKLR and



- Kenya Shoe and Leather Workers Union v Crown Industries Limited & Another* [2017] eKLR. The Claimant recruited 98 employees of the Respondent, out of a total of 125 employees, hence is entitled to be recognized.
13. The Claimant states that the recognition of a trade union and attainment of a simple majority is a matter of numbers, which is ascertainable through check-off forms signed by unionisable employees. That the Claimant submitted the signed check-off forms to the Respondent, a fact which has not been rebutted by the Respondent.
 14. As such, the failure to recognize the Claimant Union is in contravention of the *Constitution of Kenya* 2010; the *Labour Relations Act* 2007 and the *ILO Convention*.
 15. It is the Claimant's submission that it is the right union for the sector, that there is no rival trade union and that it has attained the requisite number of simple majority employees.
 16. In addition to the foregoing, the Claimant submits that following the submission of the duly signed check-off forms to the Respondent, the Claimant wrote to the Respondent to begin deducting union dues from the employees' wages in line with Section 48 (3) of the *Labour Relations Act* 2007. That the Claimant's check-off forms were in strict conformity with the statutory requirements. By virtue of Gazette Notices No. 11153 of 8th August 2013, and No. 6912 of 2nd September 2016, the Minister authorized the deductions. By reason of the premises, the Respondent was duty-bound to effect the deductions and remittances.
 17. The Claimant's position is that the Respondent's employees voluntarily and freely joined the Claimant union and were ready to have their union deducted as explained to them during the recruitment process.
 18. In its supplementary submissions dated 6th March 2023, the Claimant submits that it had 98 members as at June 2021 and at the time of filing this claim in January 2022. This Court's concern should be on the numbers as at the time of filing of the instant claim. To buttress these submissions reliance was placed on the Court of Appeal case of *Civicon Limited v Amalgamated Union of Kenya Metal Workers* [2016] eKLR.
 19. It is submitted by the Claimant that the List of Verified employees submitted by the Respondent on pages 14-17 of the Respondent's List of Documents shows that the Claimant still has 67 members out of a total workforce of 125 employees, which is 53.6% of the total employees of the Respondent. That this percentage still meets the simple majority threshold for recognition of a trade union.
 20. Of the total number of employees in the Respondent's list, 26 employees are in the non-unionisable cadre: 1 employee is the regional leader, and 25 employees are store managers and assistant store managers.
 21. It further submits that the withdrawal emails allegedly sent by the Respondent's employees were actually sent from the Respondent's shops, such as those on pages 2,4,5,9,10,11 and 13 of the Respondent's List of Documents. It is the Claimant's submission that the Court in *Tailors and Textiles Workers' Union v Global Apparels EPZ Limited* [2019] eKLR stated that union members must write resignation letters from the union to their employer. Thereafter, the employer must forward them to the Union. However, the employer cannot write the resignation letters on behalf of the employees, as the Respondent did herein.
 22. Deductions of union dues as contemplated under Section 48 (3) of the *Labour Relations Act*, are never subject to the existence of a recognition. The Claimant cites the case *Kenya Union of Commercial Food and Allied Workers v Mitra Enterprises Limited & Another* [2021] eKLR to fortify this point.



Respondent's submissions

23. In its submissions dated 21st February 2023, the Respondent submits that the restraining orders sought by the Claimant/Applicant cannot be availed. The Claimant union has not placed forth any evidence to support the alleged unjustified actions against the employees on account of their union membership. The union has failed to discharge its burden of proof on this aspect. They asserted they must prove. Reliance was placed on the provisions of Sections 107 and 108 of the *Evidence Act*, and the case of *Jacton Mangeni Kapoloni v Cabinet Secretary for the National Treasury and Planning & 3 Others* [2022] eKLR, to bolster this submission.
24. The Respondent maintains that the Claimant has not met the simple majority threshold, the precondition for a recognition agreement. It cites *Kenya Chemical and Allied Workers Union v Strategic Industries Limited* [2016] eKLR and *Kenya Union of Commercial Food and Allied Workers Union v Housemart Ltd* [2021] eKLR in support of its submission.
25. It is the Respondent's position that after carrying out a verification exercise of the Claimant's check-off forms in January 2023, it found that the Claimant has 52 members out of the Respondent's employees. Thirteen of the employees, who were part of the initial list of June 2022, subsequently wrote to the Respondent expressly stating that they no longer wanted union dues deducted from their salaries.
26. On the deduction of union dues, the Respondent submits that the Court should not issue interim orders for the deduction of such dues as the Claimant's membership is yet to be verified. According to Articles 41 and 46 of the *Constitution of Kenya* and Sections 48 (6) and (7) of the *Labour Relations Act*, joining the membership of a trade union and remaining such a member is a voluntary act. It cannot be forced on employees.
27. For a union to be entitled to receive dues from its members, it must first obtain a Ministerial Order. The Applicant hasn't demonstrated that it obtained any and that it served any on it. Consequently, the interim orders sought for union dues deduction and remittance shouldn't be granted in favour of the Claimant /Applicant.
28. Finally, the Respondent argues that the orders sought by the Claimant/ Applicant in the application are similar to those sought in the reliefs section of the Memorandum of Claim. To grant the orders sought shall be tantamount to giving final orders at an interlocutory stage. Before granting orders such as the ones sought in the instant application, evidence has to be taken. This was emphasized by the Court of Appeal in *Barclays Bank of Kenya Ltd v BIFU Kenya* [2019] eKLR.
29. It is submitted that the Claimant's claim that some of the counted employees are managers is a disputed fact that can only be determined after an oral hearing and a balloting/verification exercise. The case of *Kenya Chemical and Allied Workers Union v Bamburi Cement* relied on by the Claimant is inapplicable at this stage.
30. That where there is a dispute as to whether a union has reached the simple majority threshold for recognition, such dispute should be decided through a balloting exercise on the shop floor as was held in *Kenya Union of Commercial Food and Allied Workers v New Yako Supermarket* [2020] eKLR. In the present case, balloting was not done, consequently, it would be unfair to compel the Respondent to recognize the union.
31. The Respondent insists that pursuant to Section 19 (1) of the *Employment Act* 2007, an employer can only deduct monies from the employee's salary upon receiving a written request from the employee to do so. The Respondent states that in the present case, employees have written to it expressing their unwillingness to have the dues deducted. Union membership cannot be imposed on unwilling



employees, and so the Respondent is forced to respect the wishes of its employees. The Respondent submits that it is not unusual for employees to communicate through their official email addresses.

Analysis and Determination

32. I have considered the Notice of Motion dated 15th February 2022, the Grounds thereof, the Supporting Affidavit sworn on 15th February 2022, the Respondent's Replying Affidavit sworn on 21st February 2023, the respective submissions and supplementary/further submissions filed by both parties and authorities relied on. I find only one central issue for determination. Whether the Claimant/Applicant should be granted the Orders sought.

Whether the Claimant/Applicant should be granted the Orders sought.

33. Firstly, the Applicant prays for an order restraining the Respondent from victimizing, coercing, harassing, discriminating, terminating or disciplining any of its employees who wish to join the Claimant/Applicant Union and whose names appear in the check off forms.
34. The Respondent expressly denies, in its Replying Affidavit sworn on 21st February 2023, that it has harassed, intimidated or coerced anyone, let alone its employees.
35. I have noted the documentary evidence attached to the Affidavit in Support of Motion sworn on 15th February 2022, marked as annexures MI1-MI9.
36. The law on grant of injunctions is well established. The threshold for the grant of injunctions was aptly set out in the locus classicus of *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed itself as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

37. The first condition that the Applicant must meet, therefore, is to establish that they have a prima facie case before an order of injunction can be issued.
38. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, the Court of Appeal defined a prima facie case with a probability of success. It stated:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

39. This Court takes cognizance of the fact that it is dealing with an interlocutory application and as such it must be very cautious not to render itself on the application in a manner that will give fodder for a wrong impression that it has predetermined the main suit. On the injunctive restraining orders sought against the Respondent from victimizing, coercing, harassing, discriminating, terminating or disciplining any of its employees who wish to join the Claimant/Applicant Union, this Court has keenly considered some of the letters exhibited by the Respondent. It comes out that they were purportedly written after the filing of the suit herein. The letters indicate an unwillingness to continue



having their salaries deducted for union dues. The timing of the letters is concerning. The Court has not lost sight of the fact that ordinarily, employers wield immense power over their employees.

40. This Court gathers the impression that prima facie there are indicators that the Respondent is pressurizing its employees to disengage themselves from the Claimant union in light of the present suit. For this reason, and in the interest of upholding the Constitutional right of the Respondent's employees, under Articles 36 (1) and 41 (2) (c) of the *Constitution of Kenya*, 2010. I am persuaded to grant prayer (b) of the Claimant's Notice of Motion dated 15th February 2022.
41. On prayers (c) and (d), I agree with the Respondent's submissions that these prayers are in the nature of final prayers and identical to those sought in the Claimant's memorandum of Claim. This Court must be careful not to adjudge the main suit at an interlocutory stage as guided by the Court of Appeal in *Barclays Bank of Kenya Ltd v BIFU Kenya* [2019] eKLR; and *Olive Mugenda v Okiya Omtata* [2016] eKLR. The contested issues can only be interrogated after taking the parties' evidence in a hearing.
42. The submissions filed by both parties are disappointing. They largely spoke to the substantive suit not the instant application.
43. In light of the foregoing, I allow the Claimant/Applicant's Notice of Motion dated 15th February 2022, only to the extent of prayer (b) thereof. Costs shall be in the cause.

READ, DELIVERED AND SIGNED THIS 19TH DAY OF OCTOBER, 2023.

OCHARO, KEBIRA.

JUDGE

In the presence of:-

Ms Maneno for the Claimant

Ms Githinji for the Respondent

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 has 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 *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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

