



REPUBLIC OF KENYA



KENYA LAW

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Kenya Plantation & Agricultural Workers Union v Limuru Tea Growers Group of FKE & 7 others (Cause 263 of 2017) [2023] KEELRC 3166 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3166 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 263 OF 2017
DN NDERITU, J
NOVEMBER 30, 2023

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT

AND

LIMURU TEA GROWERS GROUP OF FKE 1ST RESPONDENT
VALENTINE GROWERS COMPANY LIMITED 2ND RESPONDENT
MENENGAI FARMERS LIMITED 3RD RESPONDENT
NYARA TEA ESTATES LIMITED 4TH RESPONDENT
NASICO LIMITED 5TH RESPONDENT
RURIGI ENTERPRISES LIMITED 6TH RESPONDENT
ALICEDALE LIMITED 7TH RESPONDENT
KIBENDA ESTATES LIMITED 8TH RESPONDENT

RULING

I. Introduction

1. In a memorandum of claim dated 20th June, 2017 the claimant, a trade union, prays for the following –
 1. A declaration that the intended termination of the recognition agreement is unlawful and unfair.
 2. A permanent mandatory injunction restraining the Respondents from terminating the recognition agreement.
 3. Costs of this cause.



2. Contemporaneously, the claimant filed a notice of motion of even date seeking the following orders –
 1. That this application be certified urgent, heard *ex-parte*, and service be dispensed within the first instance.
 2. That this Honourable Court be pleased to prohibit and/or restrain the Respondent from terminating the Recognition Agreement made between itself and the Applicant pending the hearing and determination of this application and or cause.
 3. That this Honourable Court be pleased to refer the parties herein to conciliation with regard to the intended termination of the recognition Agreement.
 4. That costs be in the cause.
3. When the above application came in court for *ex-parte* hearing on 23rd June, 2017, Radido J. issued the following orders –
 1. That the application is certified as urgent.
 2. That the Respondent(s) be and are hereby prohibited and or restrained from terminating the Recognition Agreement made between itself and the Applicant pending the hearing and determination of this application and or cause.
 3. That the application be served upon the Respondents for hearing on 19th July, 2017 at 9.00a.m.
4. However, the above application was dismissed with costs to the respondent on 18th July, 2017 after the claimant failed to attend court to prosecute the same.
5. On 18th July, 2017 the respondents entered appearance through Federation of Kenya Employers (FKE) and filed a defence to the claim seeking that the cause be dismissed with costs for having been filed before the decision of the National Labour Board (NLB) was made and as such the claim is termed premature.
6. On 25th August, 2021, with the leave of the court, the claimant filed an amended memorandum of claim adding a prayer that “An order for the Respondent to continue deduction of union dues”.
7. On 2nd February, 2022 the claimant filed a notice of motion dated 26th January, 2022 under a certificate of urgency seeking the following –
 1. This application be certified urgent, heard *ex-parte* in the first instance and service be dispensed with.
 2. This Honourable court be pleased to compel the Respondent to pay agency fees and deduct and remit union dues from he emoluments of the employees who have signed into union membership and pay arrears of unremitted union dues from the emoluments of the members since April, 2017 to date, pending the report from the National Labour Board.
 3. Costs of this application be borne by the Respondent.
8. In a ruling delivered on 28th November, 2022 the court issued the following orders –
 - a. That pending the hearing and determination of this cause or a decision from the National Labour Board the Respondents are hereby ordered and compelled to pay agency fees and deduct and remit union dues from the emoluments of the employees who have signed into union membership and pay arrears of unremitted union dues from the emoluments of the members since April, 2017 to date.



- b. The Claimant is awarded costs of this application.
9. On 13th July, 2023 all the respondents appointed Wachira Wanjiru & Company Advocates to act for them in place of the FKE and the said Advocates filed a notice of motion (the application) dated 18th July, 2023 under a certificate of urgency seeking the following orders –
1. That this honourable court do certify this application as urgent and dispense with service in the first instance.
 2. That this honourable court be pleased to stay the orders granted by this court on 28/11/2022 pending hearing and determination of this application.
 3. That this honourable court be pleased to set aside and or vary the orders dated 28/11/2022.
 4. That this honourable court be pleased to grant costs of the application to the Applicant.
10. The application is based on the grounds on the face of it and supported with the affidavit of Richard Gitau, the secretary of the 1st respondent and the finance director of the 3rd respondent, with several annexures thereto.
11. A further affidavit sworn by the same deponent on 31st August, 2023 was filed on even date alongside the written submissions by respondents' counsel. However, there is no evidence that leave was sought and or granted by the court for the filing of that further affidavit.
12. The application is expressed to be brought under Sections 3 and 12 of the *Employment Act*, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* 2016, Section 48 and 49 of the *Labour Relations Act* 2007 and all other enabling provisions of the law.
13. In opposition to the application, the claimant filed and served a replying affidavit sworn by Henry Omasire on 2nd September, 2023 and filed in court on 27th September, 2023 with several annexures thereto. An earlier replying affidavit filed in court on 28th July, 2023 was struck out for it was not properly executed as it lacked the date when it was sworn and commissioned, against the provisions of the *Oaths and Statutory Declarations Act*.
14. On 31st July, 2023 when the application came up in court for directions it was agreed that the application be canvassed by way of written submissions. Counsel for the respondents, Miss Wachira, filed written submissions on 31st August, 2023, while counsel for the claimant, Miss Omwaka, filed on 27th September, 2023.

II. The Respondent's Case & Submissions

15. In the supporting affidavit it is deposed that the respondents only gained knowledge of the court's ruling of 28th November, 2022 after the secretary general of the claimant demanded payment of union dues and agency fees. It is not disclosed the exact date when this happened.
16. It is repeatedly alleged that the claimant does not have any members among the employees of the respondents and it is on that basis that the respondent sought deregistration of the recognition agreement with the NLB. It is further alleged that the last CBA between the parties expired on 30th June, 2017 and as such there was no obligation on the part of the respondents to remit union dues or agency fees from their employees after that date. For the foregoing reasoning, it is alleged that the claimant misrepresented facts to the court to unjustly obtain the orders issued on 28th November, 2022.



17. It is deposed that the respondents are not in violation of the orders issued on 28th November, 2022 as the same are incapable of being executed in view of the contents of the above paragraph. It is deposed that after the CBA that lapsed on 30th June, 2017 no subsequent one was negotiated or agreed and as such there is no legal or factual basis upon which the respondents may execute or implement the orders issued by the court on 28th November, 2022.
18. Further, it is deposed that since none of the employees of the respondents are members of the claimant no deductions have been made since the lapse of the CBA on 30th June, 2017. It is alleged that if the respondents are ordered to remit union dues and agency fees for and on behalf of their employees, they would have to do so from their coffers as no such deductions have been made from the employees as none are deductible or remittable to the claimant.
19. It is deposed that if the orders of 28th June, 2022 are enforced the same shall infringe on the constitutional and legal rights of the respondents for fair labour practices.
20. As noted elsewhere in this ruling the further affidavit by the respondents was filed without leave of the court and the same is hereby struck out. In any event, the contents thereof were overtaken by events when the court struck out the originally filed replying affidavit by the claimant and granted the claimant leave to file a fresh replying affidavit on 19th September, 2023.
21. In the written submissions counsel for the respondents identified two basic issues for determination – Whether the court may grant a stay for orders issued on 28th November, 2022 and or vary or set aside those orders, and two, whether union dues and agency fees is payable and remittable by the respondents to the claimant.
22. Unconventionally, un-procedurally, and irregularly, it is in the submissions that counsel for the respondent has attempted to explain why and how the respondents failed to take part in the hearing of the application that culminated in the orders of 28th November, 2022, that the respondents are now seeking to stay, vary, and or set aside. It is a known principle in law that counsel cannot give evidence from the bar. Written submissions are not a forum for a counsel to fill-in evidential gaps left out by the party in its oral affidavit, and or documentary evidence. Written submissions are intended to analyze the evidence availed on record and illuminate on the law applicable with the aim of persuading and or convincing the court to rule in favour of the party so represented.
23. To the extent that counsel for the respondents has attempted to submit on facts that are not deposed to in the supporting affidavit the said submissions are completely out of order.
24. Counsel has cited several decisions to the effect that even where a party fails to take part in proceedings, though properly served, the court may set aside the resultant orders for sufficient cause. Without any evidential or factual basis, counsel argues that FKE let down the respondents by failing to provide them with efficient and effective legal representation.
25. Counsel has cited *Patel v Cargo Handling Services Limited* (1974) E.A. 75 laying emphasis on the unlimited discretion of the court in setting aside ex-parte orders or judgment. Counsel has also cited *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* (2015) eKLR on the duty of counsel to execute client's instructions, acknowledging that counsel has an equal duty to court and the opposing side to ensure that justice is served at all times.
26. On the second issue counsel has cited several decisions in asserting that without a valid CBA and membership the claimant should not demand payment of union dues and agency fees. For example, counsel has quoted Mbaru J. in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers Union (KUDHEIHA) v British Army Unit in Kenya* (2015) eKLR wherein the court



stated that “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.”

27. In *Kenya Union of Commercial & Allied Workers v Mitra Enterprises Limited & another* (2021) eKLR and *Bakery, Confectionery, Food Manufacturing & Allied Workers Union v Milly Fruit Processors Limited* (2014) eKLR Baari and Onyango JJ, respectively, held the view that an employer shall not be ordered to pay union dues and agency dues from its pockets but from actual deductions from contributing employees.
28. On the basis of the foregoing, the respondents pray that the application be allowed.

IV. Claimant’s Case & Submissions

29. In the replying affidavit the claimant views the application as an abuse of the court process intended to deny it the fruits of the orders of 28th November, 2022.
30. The deponent states that after the orders alluded to above the claimant served the respondents with the same and invited the respondents to engage on the way forward but the respondent allegedly declined and or refused to cooperate.
31. It is deposed that in their defence the respondents admit that there was a recognition agreement and a CBA which had been concluded and signed on 19th January, 2016. Thereafter the respondents purported not to be in a position to meet the agreed terms and served a three months’ notice of intention to revoke the recognition agreement and in effect the CBA.
32. In a meeting held on 10th April, 2017, between the representatives of the claimant and those of the respondents, and this is contained in the defence filed on record by the respondents, it was agreed that the procedure that the respondents had adopted in the purported revocation of the recognition agreement was irregular and in contravention of the law. It is thereafter that the respondents wrote to the NLB on 12th April, 2017 seeking its consent to revoke the recognition agreement and effectively the CBA. It is deposed that the NLB has not given the said consent.
33. Further, it is deposed that the respondents deducted and submitted union dues and agency fees up to March, 2017 and then abruptly stopped doing so.
34. It is deposed that the allegation by the respondents that the claimant has no members amongst their employees is hollow and false as no evidence has been availed to the effect that those members for whom remittance of union dues and agency fees was made prior to March, 2017 have resigned and or deregistered or withdrawn their membership with the claimant.
35. It is stated that the respondents are in contempt of the orders issued by the court on 28th November, 2017.
36. In the written submissions counsel for the claimant states that the respondents opted not to defend the application dated 26th January, 2022 that culminated in the ruling of 28th November, 2022. It is submitted that the respondents were duly represented during the foregoing proceedings but opted to neither file a replying affidavit nor written submissions notwithstanding that the court gave them an opportunity of doing so.
37. Counsel has cited *Safaricom Limited v Josenga Company Limited & 4 Others* (2021) eKLR in laying emphasis that whether represented by counsel or acting in person a case belongs to a litigant who has a duty to follow and pursue each and every step along the way to the logical conclusion of the case. It



is argued that this cause has been pending in court since 2017 and the respondents ought to have been aware of each step taken as the cause is theirs to defend as respondents.

38. It is submitted that based on Sections 107 and 108 of the *Evidence Act* it is the burden of the respondent to prove that indeed the claimant no longer has members amongst the employees of the respondents. It is submitted that claimant's membership has remained the same as it was prior to March, 2017. It is submitted that the court was right in ordering that status quo prior to that date be maintained.
39. It is on the basis of the foregoing that the claimant seeks that the application by the respondents be dismissed with costs.

V. Issues For Determination

40. Flowing from the foregoing summary as read alongside the pleadings and submissions filed from both sides, the issues for determination by this court flow from the prayers in the application –
 - a. Should the court stay, set aside, and or vary the orders of 28th November, 2022?
 - b. If (a) above is in the affirmative, what orders should issue? And,
 - c. Who should meet the costs of the application?

VI. Determination

41. It is not contested that the respondents were properly served with the claimant's application dated 26th January, 2022. In fact, the court record shows that the counsel and or representatives for the respondents attended court during the proceedings pertaining to that application and the court allotted them adequate time to respond to the application but they opted not to file a replying affidavit and or written submissions. Illustratively, this is a classic example to the FKE on how not to represent its members in court.
42. Further, the supporting affidavit to the application dated 18th July, 2023 offers no explanation as to why the respondents opted not to participate in the hearing of the application in the preceding paragraph. It is only in the written submissions, from the bar, that counsel for the respondents has alleged that the representation of the respondents failed them by failing to comply with the directions of the court and failing to file a replying affidavit and written submissions. Of course, this court shall not accept that allegation made by counsel from the bar.
43. The replying affidavit by the claimant is categorical that even after the orders of 28th November, 2022 it engaged the respondents on resolving and implementing the orders of the court but the respondents failed, refused, and or neglected to cooperate. The court has seen correspondences inviting the respondents for such engagement.
44. As rightly noted in *Safaricom Limited v Jesonga Company Limited & 4 Others (Supra)* a cause belongs to a litigant. While a mistake by counsel should not be visited upon a litigant without due consideration, it is equally true that a court of law aids the vigilant not the indolent. This is a matter of great magnitude and consequences to the respondents and there is no way the respondents should have given it a blind eye. If they did so, and it seems to be the case, the respondents belonged to the category of the indolent.
45. Further, there is no explanation given as to why it took the respondents over eight months to file the application, from 28th November, 2022 to 18th July, 2023. Again, this is evidence of a careless and indolent litigant who has no regard for or interest in a cause wherein it is a party.



46. For the two reasons expressed in the foregoing paragraphs, the court is not convinced or persuaded that it should exercise its discretion in favour of the respondents. No reason(s) is given for respondent's lack of interest in pursuing the cause, and no explanation has been offered for the unreasonable and inordinate delay in filing of the application.
47. However, the court has an eternal duty to do justice to all parties at all times. This is the essence of the provisions of Article 159 of *the Constitution*, Section 3 of the *Employment and Labour Relations Court*, and Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*.
48. Further, Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* and Order 51 Rule 15 of the *Civil Procedure Rules*, *inter alia*, allow this court to revisit its own orders and may set aside, review, and or vary such orders, whether made *ex-parte* or *inter-partes*.
49. For the foregoing reason(s), the court shall interrogate if there is any other sufficient cause that commends itself to this court for setting aside, reviewing, and or varying of the orders issued on 28th November, 2022.
50. The claimant has submitted that it was upon the respondents to demonstrate and prove that their employees were no longer members of the claimant. The claimant has predicated this argument on the ground that if the respondents were submitting union dues and agency fees prior to March, 2017. There is no evidence that such members left the union thereafter. In the filed defence, the respondents have conceded that they were paying union dues and agency fees up to at least March, 2017 when they decided to revoke the recognition agreement, allegedly on the basis that they could not afford to pay the emoluments agreed in the CBA that was coming to an end on 30th June, 2017.
51. The court has gone through the material CBA availed by the respondents and noted that the same was executed on 19th January, 2016 and was to run and apply for a period of two years running from 1st July, 2015 to 30th June, 2017. There is no provision in the CBA that the same was to overrun the said period for any reason, not even awaiting negotiation and execution of a subsequent CBA. If this be the case, and it is so held, would it be appropriate and lawful to subject the respondents to remittance and payment of union dues and agency fees pending the hearing and determination of the cause?
52. The claimant alleges that before expiry of the above CBA the parties were engaged in negotiating a new one which was to presumably take effect from 1st July, 2017 upon expiry of the above. No other binding CBA has been availed by either party and as such the court can safely assume that after 30th June, 2017 the respondents were not obligated to deduct and or remit union dues and agency fees based on the CBA as the same was to expire on 30th June, 2017.
53. The issue of whether the claimant still has members in the employees of the respondents is a matter of fact that can only be proved by way of evidence. The respondents have alleged that the claimant no longer has members amongst the lot of their employees, on the one hand, while on the other hand, the claimant alleges that its membership with employees working for the respondents is intact as it was in March, 2017. Neither of the parties has availed any documentary evidence nor substantiated the position taken.
54. In the circumstances of the foregoing, the court takes the view and holds that the binding CBA between the claimant and the respondents expired on 30th June, 2017 based on the evidence availed by both sides. There is no evidence of any other CBA going beyond that date.
55. In answer to the rhetorical question posed above, the court holds and determines that it would be unfair to order the respondents to remit union dues and agency fees beyond 30th June, 2017 based on



the availed CBA, as doing so would condemn the respondents to pay such dues and agency fees from own pockets. In any event, no evidence has been availed by the claimant for deductions from their members' emoluments beyond the life of the above CBA lapsing on 30th June, 2017.

56. The foregoing scenario calls for this court to revisit the orders of 28th November, 2022 and review, set aside, and or vary the same to reflect the justiciable position for fairness and justice.
57. For all the foregoing reasons, this court shall allow the application by the respondents dated 18th July, 2023 and set aside, vary, and or moderate the orders given on 28th November, 2022 and in their place order as follows -
 - a. That pending the hearing and determination of this cause an order be and is hereby issued against the respondents directing that they remit and pay to the claimant all union dues and agency fees that was due and payable up to and including 30th June, 2017 based on the CBA executed on 16th January, 2016 running from 1st July, 2015 to 30th June, 2017.
 - b. That the respondents shall comply with (a) above within 30 days of this ruling.
 - c. That this cause shall be fixed for hearing on priority basis and that the parties are hereby encouraged to engage with a view of having an out of court settlement within 60 days of this ruling.
 - d. That the costs of the application shall be in the cause.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 30TH DAY OF NOVEMBER, 2023

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DAVID NDERITU
JUDGE

