



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers
v BOM –Lugulu Girls High School (Employment and Labour Relations Cause
7 of 2023) [2023] KEELRC 3142 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 7 OF 2023**

**JW KELL, J
NOVEMBER 29, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS CLAIMANT**

AND

BOM –LUGULU GIRLS HIGH SCHOOL RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered and recognized under the Laws of Kenya to represent domestic workers, non-teaching staff in schools, non-medical workers in hospitals and workers in the hotel industry.
2. The Claimant on 4th July 2023 filed the Statement of Claim dated 4th July 2023 supported by the Verifying affidavit sworn on even date by the Claimant’s Branch Secretary Kakamega Thomas Mboya seeking the following reliefs:-
 - a. That the That the Honourable Court orders the Respondent to stop unfair labour practices towards members of the Respondent on the basis of their union membership.
 - b. Costs be awarded to the Claimant
 - c. Any other relief the Court deems fit.
3. Also filed together with the Statement of Claim was the Claimant’s list of Documents of even date, and its bundle of documents.
4. The claim was filed under certificate of urgency and notice of motion application of even date seeking the following orders:-



- a. The application be certified urgent and heard *ex parte* in the first instance.
 - b. That the Honourable Court be pleased to issue temporary orders restraining the Respondent from harassing , suspending , terminating or otherwise preferring disciplinary action of any kind on members of the Claimant on the basis of their union membership pending the interparte hearing and determination of this application.
 - c. That the Honourable Court orders the Respondent to stop unfair labour practices towards members of the Respondent on the basis of their union membership. The Respondent action is in gross violation of the freedom of association as envisaged by CoK 2010.
 - d. That the costs of this application be awarded to the Claimant
 - e. Any other relief the Court deems fit.
5. I considered the applications *ex parte* in chambers on the 4th July 2023 and certified the application as urgent. I further granted the Applicant a Temporary Order restraining the Respondent from harassing, terminating or taking any other disciplinary action on members of the Claimant on the basis of union membership pending hearing and determination of this application. I further gave hearing date if the application interpartes on the 24th July 2023.
6. The Respondent entered appearance through the law firm of Makokha Wattanga & Luyali Associates Advocates on 24th July 2023 and filed a Memorandum of defence to the Claim dated 21st July 2023 and received in Court on the 24th July 2023 together with Respondent’s list of witnesses, witness statement of Nathan Wanjala Sipenji dated 21st July 2023, Respondent’s list of even date, grounds of opposition of even date, Replying affidavit of Nathan Wanjala Sipenji sworn on even together with exhibits.
7. On the 24th July 2023 when the parties appeared, the Respondent had filed grounds of opposition same date and not served. The Court considered the application and ordered the interim order in place abides to judgment date. the application was consolidated with the claim and hearing directions issued for the claim. The file was further transferred from Kakamega to Bungoma for hearing and determination.
8. On the 25th September 2023 when the matter came for pretrial directions in absence of the Respondent, the representative of the claimant, Mr. Kamuye, informed the Court they wished to proceed by way of written submissions. The Court agreed and issued directions for filing of submissions.

Written Submissions

9. The Claimant’s written submissions dated 10th September 2023 were filed by Justin Waningu Kamuye, a representative of the Claimant on 12th September 2023. The Respondent’s submissions dated 27th October 2023 were filed by Makokha Wattanga & Luyali Associates Advocates.

Determination

Issues for Determination

10. The Claimant addressed the following issues in its written submissions:-
- a. Whether the Court should order the Respondent to stop unfair labour practices against the claimant’s members on account of union membership.
 - b. Cost



- c. Any other relief.
11. The Respondent in its submissions addressed the following issues:-
 - a. Whether the Claimant is entitled to reliefs sought in the claim
 - b. Costs.
 12. The Court having perused the claim and the defence and seen the issues identified by the parties was of the considered opinion that the issues placed by the parties for determination of the dispute were as follows:-
 - a. Whether there was evidence of unfair labour practices meted on the claimant's members.
 - b. Whether the Claimant was entitled to reliefs sought.
 - c. Costs

A. Whether There Was Evidence Of Unfair Labour Practices Meted On The Claimant's Members.

The Claim

13. The Claimant states that since when the non- teaching staff joined the union the Respondent turned violent and started harassing intimidating and victimising its members, this was also related to the refusal by the Respondent to sign the recognition agreement(which was canvassed in Bungoma ELRC Cause No. 8 of 2023 between the parties), that the Principal had been calling their members to explain why they joined the union.
14. The Claimant further stated that on the 7th July 2023 the Respondent called a meeting of all union members and some board members and information reached the Claimant that most of the members may be suspended and one Patrick Mutoro a cook had been indefinitely stopped from working. That the management had stopped remittance of the members dues which had been already implemented.
15. In support of the claim the Claimant annexed signed check off forms by its members, authority to deduct and remit dues, affidavit of service for cause no. ELRCC/E005/ 2023(renumbered Bungoma ELRC Cause No 8 of 2023) between the parties being dispute on the recognition agreement, copy of receipt of union dues before the Respondent stopped the remittance.
16. The Court noted that the Claimant annexed to its claim a letter dated 25th July 2022 addressed to the Respondent's Principal written by the union on Patrick Mutoro, the cook, case.

Response

17. The Respondent denied the claim for unfair labour practice and filed replying affidavit in addition to the memorandum of defence and the witness statement.
18. The replying affidavit of Nathan Wanjala Sipenji dated 21st July 2023 admitted that some of the non-teaching staff had joined the Claimant union. That the staff joined the union voluntary and the school facilitated their meeting and did not interfere with their operations. The Respondent denied all the allegations of harassment and victimization of the claimant's members. Nathan averred that all the non-teaching staff members of the school were given a retreat and trip to Kisumu at the expense of the school(Photos annexed as LGS1), that the school facilitated and remitted all dues of the union members to the Claimant(LGHS2), that the issue of Patrick Mutoro was handled by the Board and



had nothing to do with the recognition agreement (minutes of the Board dated 15th July 2022 annexed as LGHS-3).

Written Submissions

19. The Claimant submitted on the freedom from torture and cruel inhuman treatment or punishment, equality before the law and equal protection and benefit of the law, equality under Article 27, Article 29 on right to freedom and security of persons, Article 36 on freedom of association and Article 41 on right to fair labour practice all of the Constitution of Kenya, 2010. The Claimant filed statement of its members on the alleged harassment together with the written submissions. It is trite law that written submissions are not pleadings. The pleadings had closed on evidence as at time the Court issued directions for the filing of written submissions.
20. The defence in written submissions reiterated its defence to deny the claim of unfair labour practice as pleaded in their replying affidavit which facts are outlined above and the Court need not repeat them.
21. The Respondent submits that the burden of proof lies on the person alleging. That they had produced evidence of remittance of all dues (LGHS-2 was the cheque payment vouchers with last of 22nd June 2023). The Court noted that this evidence of remittance of dues was not rebutted by the Claimant.

Decision on Issue A.

22. It is trite law that he who alleges must prove. See section 107 of the Evidence Act to wit:—“Burden of proof. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.” The Claimant did not attach evidence of the harassment or victimization of its members in the claim. The Claimant attached a letter dated 25th July 2022 on Patrick Mutoro, the cook, it addressed to the Respondent school’s Principal. The content of the letter was to effect that the union believed that the management arrived at a fair decision which should be given to Patrick Mutoro. The Claimant union requested the Respondent for formal communication of the decision to Patrick Mutoro.
23. The Respondent attached the referred Board meeting minutes of 15th July 2022 (LGHS-3) which had minutes of the disciplinary committee on Patrick Mutoro, the cook. The recommendation of the Board was that Patrick Mutoro proceeds on retirement in public interest for incompetence in whatever task he is assigned. This is the decision the Claimant agreed with in its communication of 25th July 2022. I find no evidence of harassment in the case of Patrick Mutoro.
24. I do find and hold that the Claimant did not discharge their burden of proof of the alleged harassment and relied on rumours to bring the instant claim. The Claimant had obligation to prove allegation of non-remittance of dues which issue was rebutted by the Respondent by filing of the last month payment voucher dated 22nd June 2023 for Kshs. 13,519. The claim was filed on 4th July 2023. The Court opines that the Claimant union ought to have raised their concerns in writing to the Respondent before rushing to Court. The Court finds that the claims for harassment, victimisation and non-remittance of dues are baseless. The entire claim is found to be without merit.
25. Costs- The principle on costs is that costs follow the event. The event is that the claim was unmerited. The parties are in Court over the blatant refusal by the Respondent to sign the recognition agreement (Bungoma ELRC Cause No. 8 of 2023 between the parties) making relations between the union and the Respondent difficult and this could explain why the union chose to come to Court based on rumours. I will exercise by discretion and not award costs in promotion of amicable relations between the parties.



Conclusion

26. The Court holds the claim to be without merit. The claim dated 4th July 2023 and the Notice of Motion of even date are dismissed. The interim orders in place are vacated.
27. Each party to bear own costs in the claim and the application.
28. It is so Ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 29TH NOVEMBER 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

For Claimant: Kamuye

For Respondent:- Makokha

