



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v  
BOM -- St Paul Busende Secondary High School (Employment and Labour Relations  
Cause E010 of 2023) [2023] KEELRC 2811 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2811 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2023**

**JW KELL, J  
NOVEMBER 9, 2023**

**BETWEEN**

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

**AND**

**BOM -- ST PAUL BUSENDE SECONDARY HIGH SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a trade union registered and recognised 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 15<sup>th</sup> June 2023 filed the Statement of Claim dated 13<sup>th</sup> June 2023 supported by the Verifying affidavit sworn on even date by the Claimant's Industrial Relations Officer, Mr. Antonio Shiraku.
3. The suit had been triggered by the failure by the Respondent to sign the recognition agreement and the failure by the Conciliator to call parties for conciliation. Vide the Statement of Claim, the Claimant has prayed for the following reliefs:
  - a. That the Honourable court in the spirit of Social Transformation through Administration of Justice compels the respondent to sign the forwarded recognition agreement to allow for negotiation of a Collective Bargaining Agreement pursuant to Sec 54 *Labour Relations Act, 2007*.
  - b. That the Honourable Court directs the Respondent to stop harassment, intimidation and coercion the union members on the account of their membership.



- c. That the costs of this application be awarded to the claimant
  - d. Any other relief the court deems fit.
4. Also filed together with the Statement of Claim dated 13<sup>th</sup> June 2023 is the Claimant's list of witnesses dated on even date; a list of Documents of even date, and its bundle of documents.
  5. The Respondent entered appearance through the Office of the Attorney General & Department of Justice on 14<sup>th</sup> July 2023 and filed a Response to Claim dated 17<sup>th</sup> July 2023 and received in court on 21<sup>st</sup> July 2023.

### **Written Submissions**

6. The court on 26<sup>th</sup> July 2023 directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 4<sup>th</sup> September 2023 were filed by Justin Wangu Kamuye, a representative of the Claimant on 11<sup>th</sup> September 2023. The Respondent's submissions dated 27<sup>th</sup> September 2023 were filed on even date by Gilbert Tarus, Senior State Counsel for the Office of the Attorney General.

### **Claimant's Claim**

7. The Claimant claims that the Respondent employed non-teaching staff in various capacities and the Claimant duly requested the Respondent for an opportunity to sensitise the said staff about the role of the Trade union through their letter dated 25<sup>th</sup> November 2021( App.1- Pg. 8).
8. The claimant visited the Respondent's premises for the sensitisation purposes and non-teaching staff of the Respondent voluntarily joined the membership of the Claimant(App.2- Pg.9), which numbers the Claimant states met the simple majority required under Section 54 of Labour Relations Act, 2007(LRA), as seven out of the Nine non-teaching staff joined, which represented 77.7%. That the claimant forwarded the deduction authority(App.3-Pg10) of its members on 8<sup>th</sup> December 2021 to the Respondent for check off and elections of the works committee were conducted with the Respondent in the know(App.4-Pg.11).
9. That the respondent implemented the Check-off through deduction and remittance of union dues(App.5- Pg.13) prompting the Claimant to send the invitation dated 27<sup>th</sup> July 2022(App.6-pg.14) inviting the Respondent to execute the Recognition agreement(pg.15) pursuant to Section 54 of LRA.
10. The Claimant on 7<sup>th</sup> February (App.7.pg.21) invited the respondent for execution of the Recognition agreement on 22<sup>nd</sup> February 2022, when the Respondent refused to sign. The Claimant forwarded the matter to its head office for action by the General Secretary(App.8 .pg. 22).
11. The Claimant forwarded the dispute to the Ministry of Labour (App.9 pg. 23) and a conciliator(Ms. Agripina Auma) was appointed on 12<sup>th</sup> April 2023(App.10-pg.24). The claimant submits that the conciliator has failed to invite parties for a conciliation pursuant to Section 67(1)of LRA which requires the appointed conciliator to attempt to resolve the dispute within 30 days or such other period as may be agreed by parties and where the dispute is not resolved to issue a certificate that the dispute had not been resolved.
12. The claimant submits that under Article 36 and 41 of the Constitution, people have a right to association and workers a right to join a trade union respectively, and the same cannot be curtailed. The Claimant submits that the Respondent is trying to avoid the Recognition agreement yet the claimant has negotiated similar agreements with other institutions.



13. The Claimant submits that the failure to recognise the Claimant will jeopardise efforts to organise and enter into a collective bargaining agreement which is anchored in the ILO Conventions Nos. 087 and 098. The Claimant asserts that by virtue of Legal notice No. 263 of 26<sup>th</sup> August 1993, issued under the Education Act, Cap 211, individual Boards of Management are advised to enter into recognition agreements, and since its members pay dues without recognition, they cannot represent them.
14. The Claimant claims that it made all efforts to push for conciliation and the delay therefore has led the Respondent to ask the new member to forfeit their membership.

### **Respondent's Response**

15. The Respondent states that although it allowed the Claimant to sensitise its employees, the claimant tricked and/or misled its non-teaching Staff by using the attendance sheet as a form of recruitment.
16. The Respondent states that the claim is premature as the Claim between it and the claimant must first be resolved by the conciliator before the parties approach court. The respondent submits that the conciliator recommended that the Claimant conduct a capacity building exercise and before the dispute could be solved before the Conciliator, the claimant rushed to file the instant claim.
17. The respondent states that it has not harassed any of its staff and no proof exists and prays that the claim be dismissed with costs.

### **Determination**

#### **Issues for determination**

18. The claimant identified the following issues for determination:-
  - a. Whether the Respondent should sign the recognition agreement.
  - b. Whether the Hon. court should order the Respondent to stop harassment, intimidation and coercion of union members on account of their union membership
  - c. Whether the claim was filed prematurely.
  - d. Whether the Respondent should pay costs of the suit.
19. The Respondent identified the following issues for determination:-
  - a. Whether the claim is premature.
  - b. Whether the claimant is entitled to the orders sought.
  - c. Whether the claimant is entitled to costs.
20. The court having considered the parties' submissions will address the following issues:-
  - a. Whether the claim is premature and whether the Claimant's members were harassed by the Respondent
  - b. Whether the Claimant is entitled to the orders sought.



### Whether the claim is premature?

21. The issue whether a suit is premature goes to the question whether the court's jurisdiction was properly invoked.
22. The Claimant referred a trade dispute to the Cabinet Secretary, Ministry of Labour and Social Protection on March 14, 2023, after the respective parties had attempted to agree on the execution of the Recognition agreement via written communication and physical meetings, but to no avail.
23. A Conciliator was appointed vide the letter of 12<sup>th</sup> April 2023, through which letter the parties were directed to file their respective proposals within seven days from the date of the said letter.
24. Section 67 of *Labour Relations Act*(LRA) provides that a Conciliator shall attempt to resolve the trade dispute referred to in section 65(1) within (a) thirty days of the appointment; or (b) any extended period agreed to by parties to the trade dispute.
25. The Claimant argues that the conciliator did not invite parties to conciliation within 30 days nor did the parties extend the said period. The claimant argues that due to the plight of its members who were being harassed by the Respondent to withdraw their membership from the Claimant, it exercised due diligence, filed its Memorandum of dispute and due to the delays in the conciliation, invoked the court process.
26. The Respondent on the other hand submits that, the dispute was before the conciliator for conciliation and before the same was finalised the Claimant brought the present suit. The Respondent states that the conciliator recommended that the claimant undertakes a Capacity building exercise, and that there is no evidence of unresolved dispute. The Respondent argues that the matter be referred to the conciliator to resolve.
27. The letter appointing the conciliator stated that the said memorandum of dispute was to be filed by each party within seven days from 12<sup>th</sup> April 2023. As at 17<sup>th</sup> April 2023, when all parties were to file their respective memoranda, none of them had filed. The claimant filed its memorandum of dispute on 29<sup>th</sup> May 2023(pg.25- 28 of claim). There was no evidence whether the Respondent filed its memorandum before the conciliator.
28. The claimant proceeded and filed the present suit on 15<sup>th</sup> June 2023, seventeen days after filing its memorandum with the Conciliator, suspending the progress of any Conciliation process.
29. By virtue of Section 67 of LRA, the conciliator can only resolve a dispute which has been filed before him or her; which is the Memoranda to be filed by the respective parties. It is once the parties have filed their respective issues in dispute that a conciliation process can begin as the Conciliator cannot help parties resolve a dispute without having a summary of each party's issue in dispute.
30. With the Claimant having filed its Memorandum of dispute on 29<sup>th</sup> May 2023, whether or not the Respondent filed its own Memorandum, the Conciliator mandate to conciliate the dispute is within Thirty days or more as the case may be.
31. Section 69 of LRA provides that a dispute is deemed unresolved after conciliation if:-a. Conciliator issues a certificate that the dispute has not been resolved by conciliation or; b.the Thirty days' period from appointment of conciliator or any longer period as agreed by the parties expire.
32. When the Claimant filed the Memorandum of dispute on 29<sup>th</sup> May 2023, the Conciliator had thirty days within which the parties could be heard. The Claimant's action of filing the claim seventeen days after it filed its memorandum was premature as the Conciliator still had time to hear the parties.



- The claimant has not produced before court any evidence that any of the subscribed members of the respondent indeed withdrew their membership to warrant the abandoning of the conciliation process.
33. By virtue of Rule 5(3) of the Employment and Labour Relations Court (Procedure) Rules 2016 , if conciliation has not taken place, the statement of claim is to be accompanied by an affidavit sworn by the claimant or by the representative of that claimant attesting to the reasons why conciliation has not taken place.
  34. There was no affidavit sworn by the representative of the claimant attesting to the reasons why conciliation has not taken place. The provisions of Rule 5(3)(supra) are couched in mandatory terms to require that where a dispute was referred to conciliation and the conciliation does not take place, aside from the Statement of Claim filed, a separate affidavit be sworn attesting the reasons why the conciliation did not take place. There was no affidavit filed by the Claimant to this extend.
  35. In view of the foregoing, the court discerned that the conciliation process was pending. By dint of the Employment and Labour Relations Court (Procedure) Rules, 2016, Rule 5 which requires that where a dispute has been subject of conciliation, the Claim shall be accompanied by Conciliator's Report, Certificate of Conciliation or an Affidavit sworn by the Claimant, attesting to the reasons why Certificate of Conciliation has not issued, the same are not available. The issue cannot be properly adjudicated upon by the Court, while it is pending the consideration of the Conciliator.
  36. Article 159(2) of *the Constitution* stipulates that in exercise of judicial authority, the Court shall promote alternative forms of dispute resolution. It is the opinion of the court that once a Party has invoked the conciliation Mechanisms under the *Labour Relations Act* section 65, that Party must exhaust those mechanisms, before coming to Court. It is improper for the Claimant to abandon the conciliation process mid-stream, and initiate judicial process. In this dispute, there is an ongoing conciliation process. The Conciliator has not issued any Certificate, to indicate failure of conciliation. It is not known if in the end, Parties will record settlement.
  37. The Court is guided by the Court of Appeal in *Karen Blixen Camp Limited v Kenya Hotels and Allied Workers Union* [2018] eKLR(Waki, Makhandia & Gatembu, JJ.A) Which in allowing a statement of claim to be heard without finalizing the conciliation process held that:-

“ 17. In this case, the respondent took the option of reporting the matter to the Minister although it would have been perfectly entitled to proceed to court directly. The dispute would have been resolved possibly within 90 days if the time table set out in section 62 to 72 was followed. But it was not and the Minister was responsible for frustrating the time table. There is no provision in the Act on what happens when the Minister so behaves. One way, not the only way as suggested by the appellant, was for the ELRC to entertain a petition for an order of mandamus to compel the Minister to Act. But that option would be about procedural propriety only and would entail further costs and delay in agitating the actual claim.” The Court of Appeal recognized that the ELRC Court has the jurisdiction a fair administration procedure has not been followed in a dispute relating to employment and labour relations, to exercise such powers including the issuing of an order of mandamus to compel the Minister to Act. The Court of Appeal considered the issue of costs and the long delay in the said suit which had been pending for seven years in declining to order the minister to finalize conciliation, which is not the case in the present



suit. The instant case was filed on 15<sup>th</sup> June 2023 hence timely for return to the conciliation process.

38. In the upshot, considering that the Claimant abandoned the conciliation process even before the same commenced and there being no evidence before the court that its members were harassed by the Respondent, I Hold that the Claim herein is premature and improperly brought before the Court.

**Whether the Claimant is entitled to the orders sought.**

39. The Claimant had sought for:-

1. That the Honourable court in the spirit of Social Transformation through Administration of Justice compels the respondent to sign the forwarded recognition agreement to allow for negotiation of a Collective Bargaining Agreement pursuant to Sec 54 [Labour Relations Act](#), 2007.
2. That the Honourable Court directs the Respondent to stop harassment, intimidation and coercion the union members on the account of their membership.
3. That the costs of this application be awarded to the claimant
4. Any other relief the court deems fit.

40. The court recognizes the right of the employees to join union and to enjoy the benefits on unionization offered by the union which include representation at shop floor and collective bargaining. The right is anchored in international law, [the Constitution](#) and statutes. See Article 8 International Covenant on Economic, Social and Cultural Rights:- “1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;” ; The International Labour Organization Convention 87(1948), Right to Organize and Collective Bargaining: Convention 98(1949); Article 41 of [the Constitution](#) to wit: ”1) Every person has the right to fair labour practices. (2) Every worker has the right— (a) to fair remuneration; (b) to reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike. (3) Every employer has the right— (a) to form and join an employers organisation; and (b) to participate in the activities and programmes of an employers organisation. (4) Every trade union and every employers’ organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.” The [Labour Relations Act](#) section 4 to wit:-“ 4. Employee’s right to freedom of association (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 and section 5. “Protection of employees (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.” The court finds Conciliation is a suitable mechanism for resolution of trade disputes specifically the instant dispute on the recognition of the union by the Respondent.

41. Considering that the Conciliation process was not finalized and which process the Respondent agrees to participate in, in the spirit of promoting alternative forms of dispute resolution in the exercise of judicial authority encompassed in Article 159(2) of [the Constitution](#), the Court orders the parties to comply and exhaust the procedure on conciliation under section 65-69 of the [Labour Relations Act](#).



42. The Claimant did not produce any evidence that any of its members have been harassed or intimidated due to their membership, and in any event the Respondent transmitted union fees (pg.13 of claim) from the claimant's members to the Claimant.

**Conclusion**

43. The claim is declared premature and dismissed. Each party to bear own costs.
44. The Court having found the claim premature on basis of the pending conciliation process hereby orders the parties to appear before the appointed Conciliator on the 15<sup>th</sup> November 2023 at 10 AM morning hours for the conciliation process and for the appointed Conciliator to conclude the conciliation on the issue of recognition within 30 days after the first meeting.
45. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 9<sup>TH</sup> NOVEMBER 2023.**

**JEMIMAH KELI**

**JUDGE.**

