



REPUBLIC OF KENYA



Kenya Building Construction Employees Union v Vaghjiyan Enterprises Ltd (Employment and Labour Relations Cause 286 of 2022) [2023] KEELRC 2805 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2805 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 286 OF 2022
MA ONYANGO, J
NOVEMBER 2, 2023**

BETWEEN
KENYA BUILDING CONSTRUCTION EMPLOYEES UNION CLAIMANT
AND
VAGHJIYAN ENTERPRISES LTD RESPONDENT

RULING

1. The Claimant is a trade union registered under the *Labour Relations Act* to represent employees in the building and construction sector as more specifically defined in the union's constitution registered by the Registrar of Trade Unions.
2. The Respondent is a limited liability company registered in Kenya. In its letterheads the Respondent describes itself as 'Civil & General Building Contractors'.
3. The Claim is brought by the Claimant on behalf of two members Kellen Wambui Maina and Mary Jepkorir Tanui, hereafter referred to as the "Grievants" who were in the employment of the Respondent.
4. In the Memorandum of Claim dated 5th May, 2022 and filed on 6th May, 2022 the Claimant avers that:
 - i. That the 2 grievants, Kellen Wambui Maina and Mary Jepkorir Tanui were employed by the Respondent on the 1st September 2018 and 1st February 2018 respectively as storekeepers and they have been members of the Claimant
 - ii. That the Grievants earned an initial salary of Kshs 15,000 at the time of employment but their salaries have been increased to Kshs. 23,000 at March 2022.
 - iii. On or about the 8th April 2022, the Respondent issued to the 2 Grievants employment contracts dated the 1st March 2022 for execution which contracts the Grievants declined to sign for being unlawful and discriminatory.



Particulars of Discrimination

- a. Commencement date being 1st March 2022 despite the grievants having been employed in 2018
 - b. Failure to make provisions for the prior oral contract under which the grievants served.
 - c. Saturday working hours being 5 hours instead of 5 hours as provided for by the Building and Construction wages order of 2012.
 - d. Offering salary of Kshs 24,110 while the said wages order provides Kshs 25,080 as minimum salary for storekeepers
 - e. The contract provides for 21 annual leave days while the said sectoral wages order provides for 26 days -para 11
 - f. In case of illness, the contract provides for 7 days with full pay and 7 additional 7 days at pay, while the wages order provides for 40 days with full pay and 50 days with pay.
 - iv. That when the claimant sought for amendment of the offensive clauses, the Respondent responded by issuing termination notices to the 2 Grievants.
 - v. That the Respondent has vehemently refused to engage the the Claimant on the service benefits owing to the 2 Grievants for the duration of their employment omitted by the contracts and has now resorted to terminate the employment of the 2 Grievants for 'failure to execute new contracts'.
 - vi. That it is an unfair labour practice by the Respondent to allege to issue employment contracts that offend the provisions of minimum provisions in the industry.
 - vii. That indeed, the real intentions of the Respondent is to defeat ongoing labour disputes being handled by the Cabinet Secretary which include grievances of gross underpayment of wages to its employees and denial of annual leave to the employees which issues were escalated after a strike notice was issued.
5. The Claimant states it reported a dispute to the Cabinet Secretary Ministry of Labour where some issues in dispute were resolved with the exception of the issues now before the court.
6. The Claimant seeks the following remedies against the Respondent:
- a. An order to issue suppressing the termination of the 2 grievants dated .
 - b. An order to issue directing the Respondent to review and or amend the Contracts of employment dated 1st March to align with the minimum legal requirements.
 - c. An order to issue directing the Respondent to first discharge the previous oral contracts it had with the 2 Grievants, or
 - d. In the alternative an order to issue directing the Respondent to incorporate the duration served under the oral contract into the new employment contracts issued to the 2 Grievants.
 - e. Any other order that this Honorable Court may deem fit to grant.
 - f. Cost of this Claim
7. Simultaneously with the Memorandum of Claim the Claimant filed an application by way of notice of motion under certificate of urgency by which it sought the following orders:



1. That this application be certified as urgent and be heard ex parte in the first instance.
 2. That pending the hearing and determination of this application interparties, this Honourable Court be pleased to stay notices of termination of employment issued to Kellen Wambui Maina and Mary Jepkorir Tanui on the 19th April 2022 by the Respondent and expiring on the 18th May 2022
 3. That pending the hearing and determination of this application interparties, this Honorable Court be pleased to stay the employment contracts presented to Kellen Wambui Maina and Mary Jepkorir Tanui for execution dated 1st March 2022 by the Respondent.
 4. That costs be in cause.
8. Upon considering the application in chambers in the absence of the parties on 6th May, 2022 the court certified the application urgent and ordered that status quo as at the date of the order be maintained pending further orders of the court. The application was fixed for inter parties hearing on 13th May, 2022.
9. The Respondent filed grounds of opposition to the application dated 13th May, 2022 in which it opposed the application on the following grounds-
1. That the application and entire suit is non-starter since the Respondent has no recognition agreement with the Claimant Union.
 2. That the employees subject of these proceedings cannot be union members since their nature of work falls outside the scope of the union mandate.
 3. The Claimant's claim is purely premised on Regulation of Wages (building and Construction Industry) Order [Cap. 229, sub. Leg., s. 110, LN. 94/2004.] but which is not applicable to the two employees herein.
 4. The Claimant's claim is a disguised attempt to vex and intimidate the Respondent into bowing to the union's illegal demands.
 5. That the application and entire suit is fundamentally and incurably defective.
 6. That the application and entire suit is an abuse of the court process.
10. On 17th May, 2022 when the parties appeared before the court for inter parties hearing the court issued orders as follows:
1. That the application dated 5th May, 2022 is taken out and an order is hereby issued that the letters of termination notices be stayed pending hearing and determination of the suit.
 2. That this suit together with the application to be disposed of by way of written submissions.
 3. That the Respondent to file replying affidavit.
 4. That the Claimant to file submission together with any supplementary affidavit within 14 days of service.
 5. That the Respondent to file submissions within 7 days of service.
 6. Mention on 22nd June 2022 to take date of Judgement.



11. The Respondent filed a replying affidavit of Betty Kamiro its Legal Officer in which she states that the Grievants Karen Wambui Maina and Mary Jepkorir Tanui worked for the Respondent in its yard which was a store for keeping the Respondent's bulk purchase and a mechanical workshop with no woodwork activities.
12. She further deposed that the scope of work covered by the Grievants is totally different and cannot fall under the Claimant union at all and as such cannot be governed by the Regulation of Wages (Building and Construction Industry) Order.
13. She deposed that the Claimant was not the proper union for the Respondents' employees as the Respondent did not carry on for gain any of the activities listed in the Regulation of wages (Building and Construction Industry) Order.
14. Miss. Kamiro deposed that the Respondent is undergoing complete restructuring to align itself to meet its objectives and thus issuing new contracts with better terms and salary increment to all the employees. She further deposed that the deliberate failure to sign the new contracts by the Grievants on the misguided position that they are receiving inadequate salaries has greatly frustrated the Respondent's operations.
15. It was her averment that upon the failure of the Grievants to sign the new contracts, the Respondent had observed all the basic tenets of fair labour practices by issuance of 30 days termination notices and restructuring notices as required.
16. It was therefore her position that the entire claim is frivolous, vexatious and an abuse of court process. That the union claims that the Respondent has several other disputes is completely unfounded and amounts to mudslinging and that the Respondent has never received any such claims and has always treated employee matters in a fair manner and in strict adherence to the [Employment Act](#) and Laws.
17. Miss Kamiro deposed that the Claimant is hitting back because it has no recognition agreement with the Respondent having failed to meet the threshold for recognition.

Submissions by the Claimant

18. The Claimant submitted that although it is yet to be recognised by the Respondent, it represents and safeguards the rights of its members under the Building and Construction wages order 2012. It submitted that the new contracts which the Respondent wanted its employees to sign had terms and conditions of employment which were inferior to the Building and Construction Wages Order in terms of working hours, salary, annual leave and sick leave contrary to the provisions of section 26 of the [Employment Act](#) and Section 48 of the [Labour Institutions Act](#).
19. It submitted that the contracts were therefore invalid, unfair, illegal and unenforceable, relying on the decision in Paul Iling'a Ichilayi v Gilly's Security & Investigation Services Ltd [2016] eKLR.
20. The Claimant further submitted that the termination notices issued to the Grievants did not certain valid reasons as provided in Section 45 of the [Employment Act](#) and that failure to execute an invalid contract is not a valid reason for termination of employment.
21. The Claimant urged the Court to stop the Respondent on its tracks and allow the prayers in the memorandum of claim as prayed.



Submissions by the Respondent.

22. The Respondent submitted that the two Grievants worked for the Respondent in its yard undertaking clerical and data entry duties. That the yard is a store for keeping the Respondents bulk purchases and a mechanical workshop with no work activities within the scope of the union's membership.
23. It is submitted that the activities undertaken at the Respondent's yard by the Grievants do not fall under the Claimant's scope and that the Grievants cannot be governed by the Regulation of Wages (Building and Construction Industry) Order.
24. It is further submitted that there is no recognition agreement between the Respondent and Claimant. That the Claimant is a complete stranger to the employment relationship between the Respondent and the Grievants.
25. The Respondent quoted and relied on the decision in *Communication Workers Union v. safaricom Ltd* [2014] eKLR wherein the Court struck out the Claimant's suit on grounds that the union had no locus to file the suit.
26. The Respondent further relied on the decision in *Kenya Shoe & Leather workers union v Modern Shop factory LTD* [2017] EKLK
27. The Respondent further relied on the decision in *Kenya Building, Construction, Timber & Furniture Industries Employee Union Kafunapasa Company Limited* [2017] eKLR where the Court held that the union lacked privity as there was no recognition agreement or collective bargaining agreement between the parties and the union had failed to prove that the grievants were its members at the time of termination of their employment.
28. The Respondent further submitted that it was undergoing restructuring which necessitated issuing of new contracts to employees on 1st March 2022 and the Grievants failed to provide reasons for declining the contract hence the issuance of the 30 day termination notices to the Grievants.
29. The Respondent prayed that the suit be dismissed.

Analysis and Determination

30. The issues arising for determination from the pleadings and submission are:
 - i. Whether the Claimant has locus to represent the Grievants;
 - ii. Whether the Respondent had valid reason to issue termination notices to the Grievants;
 - iii. Whether the Claimant is entitled to the orders sought in the Memorandum of Claim.

Locus

31. The right of an employee to join a trade union of his or her choice is enshrined in Article 41 of *the Constitution* which grants every employee a right to form, join or participate in activities and programmes of a trade union.
32. The right is echoed in Section 4 of the *Labour Relations Act* which provides-
 - (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



- (c) leave a trade union.
- (2) Every member of a trade union has the right, subject to *the constitution* of that trade union to—
- (a) participate in its lawful activities;
 - (b) participate in the election of its officials and representatives;
 - (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and
 - (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to *the constitution* of that federation to—
- (a) participate in its lawful activities;
 - (b) participate in the election of any of its office bearers or officials; and
 - (c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.
33. Section 5 (1) further provides for protection of employees as follows-
- Section 5
- (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.
34. The employees of the Respondent are therefore entitled to join a trade union of their choice provided the membership clause in *the constitution* of the trade union covers the sector in which the employer operates.
35. In the instant case the Respondent submitted that the Claimant has no mandate to represent the Grievants who perform clerical and data entry work in the Respondent’s store for keeping bulk purchases and mechanical workshop. Union representation is not based on the role that an employee undertakes in an organisation but rather on the sector in which the employer of that employee operates.
36. Membership of a union is provided for in section 33 of the *Labour Relations Act* which provides that no person shall be a voting member of a trade union unless that person is employed in the sector for which the union is registered. The qualification for membership is thus the sector in which the employer operates and payment of union subscriptions. This is also provided for in section 4 of the *Labour Relations Act* which permits an employee to join the membership of a union of his/her choice “subject to *the constitution* of that trade union”.
37. In the instant case the Respondent did not mention the sector in which it operates. It has only dwelt on the duties performed by the Grievants yet it is the sector in which the employer operates that is material for membership to a union.
38. The argument by the Respondent would imply that employees performing different roles in one organization would belong to different trade unions which is not the correct position.



39. The letterheads of the Respondent describe it as “Civil and General Building Contractors”. Since the Claimant’s membership is drawn from persons engaged in the building and construction industry, it is the proper union for employees of the Respondent.
40. In this case the Claimant has also exhibited membership cards of the Grievants as proof that the Grievants’ were indeed members of the Claimant and were therefore entitled to be represented by the Claimant. In the cases cited and relied upon by the Respondent there was no proof of membership of the union by the employees.
41. I find and hold that the Claimant has locus to represent the Grievants by virtue of the Respondent operating in the building and construction industry and by virtue of the Grievants having joined the membership of the Respondent as is evident from their membership cards.
42. The Respondent also submitted that there is no recognition agreement between the Claimant and the Respondent. Membership of a trade union is separate from recognition and collective bargaining. A trade union recruits individual members who then become entitled to all benefits of membership including representation by the union.
43. It is thereafter, when the union acquires a simple majority membership in an organization, that it becomes entitled to recognition which in turn makes it eligible to negotiate a collective bargaining agreement for its members. Indeed, membership is provided for in section 33 and 49 of the [Labour Relations Act](#) while recognition and collective bargaining are provided for in sections 54 and 57 of the Act. Recognition agreements and collective bargaining agreements are therefore not pre-requisites for representation by a trade union.

Whether the Respondent had valid reason to issue termination notices to the Grievants

44. The termination notice issued to the 1st Grievant reads as follows:

Vaghjiyani Enterprises Ltd

Date: 19TH April, 2022

Name: Kellen Wambui Maina

ID No: xxxx

Gender: Female

Dear Kellen,

RE: Notice of Termination

We write to inform you that the organization intends to terminate your employment with us.

This will be done on 18th May 2022 which will be your last day with us.

As you are aware the organization is undergoing restructuring and issuing new contracts to employees. On 8th April 2022 the organization issued you with a new contract with better terms of employment including a pay rise. Your failure to execute the new contract has frustrated the company operations in realizing its new operations structure.

Therefore, this letter serves you with the 30-day notice as required.

However, before you are paid your final dues you will be required to clear with all company departments. Ensure you pick the clearance form from the HR Office.

We shall give you a certificate of service in line with the [Employment Act](#) Sec 51.



We thank you for your contributions till date to the organization and wish you the very best in your endeavors.

Yours faithfully

For Vaghjiyani Enterprises

Signed

Hiten Vaghjiyani

Director

45. The Claimant has stated that the reasons why the Grievants declined to sign the contracts issued to them were:
- a. Commencement date being 1st March 2022 despite the grievants having been employed in 2018
 - b. Failure to make provision for the prior oral contract under which the grievants served
 - c. Saturday working hours being 5 hours instead of 5 hours as provided for by the Building and Construction wages order of 2012.
 - d. Offering salary of Kshs 24,110 while the said wages order provides Kshs 25,080 as minimum salary for storekeepers
 - e. The contract provides for 21 annual leave days while the said sectoral wages order provides for 26 days -para 11
 - f. In case of illness, the contract provides for 7 days with full pay and 7 additional days at half pay, while the wages order provides for 40 days with full pay and 50 days with half pay.
46. The Respondent has not denied the issues raised by the Claimant about the new contracts which are evident from the contracts which are annexed to the bundle of documents filed by the Claimant.
47. The Claimant has also annexed a copy of the Building and Construction Industry (Wages) Order, 2012 which provides more favourable terms than those contained in the Respondent's contract that the Grievants declined to sign.
48. Section 26 and 48 of the *Employment Act* provide that an employer shall not give less favourable terms to its employees than those provided for in the Act or in regulations.
49. Section 26 provides:
26. Basic minimum conditions of employment
1. The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
 2. Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.
- [Emphasis added]
- Section 48 of *Labour Institutions Act* provides:



48 (1) Notwithstanding anything contained in this Act or any other written law—

- (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
 - (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.
- (2) An employer who fails to—
- (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
 - (b) provide an employee with the conditions of employment prescribed in the order, commits an offence.

50. Section 46 of the [Employment Act](#) provides that an employer shall not terminate the employment of an employee for initiation or proposed initiation of complaint or other legal proceedings against his employer except where the complaint is shown to be irresponsible and without foundation.

51. In the instant case the complaint by the employees was genuine as the terms of the contract they declined to sign were inferior to the provisions of the law and therefore unenforceable. There was therefore no valid reason to terminate the employment of the Grievants.

Remedies

52. Having found that the Claimant is the rightful union to represent the employees of the Respondent and that the contracts which the Respondent issued to the Grievants was inferior to the minimum terms provided in the wages order for the building industry in which the Respondent operates, I make the following orders: -

- a. An order be and is hereby issued suppressing the notice of termination of the 2 Grievants dated 19th April 2022.
- b. An order to issue directing the Respondent to review and or amend the Contracts of employment dated 1st March to align with the minimum legal requirements.
- c. An order be and is hereby issued directing the Respondent to first discharge the previous oral contracts it had with the 2 Grievants, or in the alternative an order be and is hereby issued directing the Respondent to incorporate the duration served under the oral contract into the new employment contracts issued to the 2 Grievants.

53. The Respondent shall pay the Claimants costs of this suit.

Orders accordingly.

DATED, DELIVERED VIRTUALLY AND SIGNED AT ELDORET THIS 2ND DAY OF NOVEMBER, 2023.



M. ONYANGO
JUDGE

