



**Kenya Shipping Clearing Freight Logistics and Warehouses Workers Union  
v Wilham (K) Ltd & another (Employment and Labour Relations Cause  
E1074 of 2021) [2023] KEELRC 3202 (KLR) (1 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3202 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1074 OF 2021  
AN MWAURE, J  
DECEMBER 1, 2023**

**BETWEEN**

**KENYA SHIPPING CLEARING FREIGHT LOGISTICS AND WAREHOUSES  
WORKERS UNION ..... CLAIMANT**

**AND**

**WILHAM (K) LTD ..... 1<sup>ST</sup> RESPONDENT**

**EAST AFRICAN GROWERS LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed an amended memorandum of claim dated 7<sup>th</sup> July 2023 and sought the following reliefs:

**Claimant’s Case**

2. The Claimant avers that it has been representing the employees of the Respondents and it had made several attempts to have Recognition Agreement signed by the Respondents, but however, the Respondent failed to do so and instead used tactics of declaring the entire employees redundant. They also transferred the existing employees to its sister company as new employees, Shalimar (K) Ltd to serve a purpose of denying the employees right of being represented by a trade union.
3. The Claimant avers that on 27<sup>th</sup> April 2020, the Respondents issued a circular to all employees informing them their employment with the Respondents was terminated and Shalimar Flowers Ltd would offer them fresh Employment contracts.
4. The Claimant avers that in response, the Respondents gave a notification that they had merged and would operate as Shalimar Flowers (K) Ltd and at the same time gave another contradicting statement



that the EAGA Group of companies i.e. Mwanzi Ltd, Mahee Farm Ltd, Wilham (k) Ltd and East African Growers had transferred their business and assets to Shalimar Flowers Ltd but did not say that their identity ceased to exist.

5. The Claimant avers that after examining the contracts issued to the affected employees, it established that the company mentioned therein is Shalimar Flowers Ltd and not Shalimar Flowers (K) Ltd; the word 'Merger' is mentioned as an alternative and the current employment is said to have been terminated and Shalimar Flowers Ltd is offering such an employee fresh employment and such an employee have no claim of any nature whatsoever against the Respondents herein.
6. The Claimant avers that after making several approaches which failed to attract the Respondents to abandon its decision, it reported the issue as a trade dispute resulting to the appointment of the conciliator by the Cabinet Secretary for Labour.
7. The Claimant avers that during the conciliation joint meeting the Respondents submitted the following: -
  - a. The companies Mahee Flowers Ltd, Mwanzi Flowers Ltd, Wilham (K) Ltd and East African Growers Ltd transferred its business and assets to Shalimar Flowers (K) Ltd. Shalimar Flowers (K) Ltd is an identity of its own.
  - b. The employee's transfers, each company entered a tripartite agreement between employees and Shalimar flowers (K) Ltd.
  - c. The employee's employment with each company was terminated considering SHALIMAR Flowers Ltd offered fresh employment contracts.
  - d. Directors for four (4) companies are the same, what changes was "shares".
  - e. There was a signed Agreement between the sister trade union Kenya Plantation & Agricultural Workers Union and Shalimar Flowers Ltd
8. The Claimant avers that the conciliation joint meeting took place and the findings and recommendations came out in favour of the Respondents but the Claimant union became aggrieved and channelled the dispute to be heard on merits

### **Respondent's Case**

9. The Respondent filed an amended reply to claimant's memorandum of claim dated 14<sup>th</sup> July 2023.
10. The Respondent avers that the Claimant does not represent its employees and there is no Collective Bargaining Agreement between the Claimant and the Respondents to empower the Claimant to represent any of the Respondents' employees as it has not met the threshold for recognition having failed to recruit majority of the Respondents' employment.
11. The Respondents avers that the 1st Respondent had a total of 374 employees from whom the Claimant recruited only 8 employees while the 2<sup>nd</sup> Respondent had a total of 111 employees from whom the Claimant recruited only 10. The Claimant has only managed to recruit 18 out 485 employees of the Respondents.
12. The Respondents avers that prior to the internal reorganization, they had discussed the same with their employees and thereafter proceeded to issue the circular dated 27<sup>th</sup> April 2020 to effectively inform their employees of the restructuring and the resultant change in the businesses of the Respondents.



13. The Respondents avers that with employees' consent, the employees were transferred without loss of any benefits and none of them lost his/her employment as the transfer did not affect the continuity of their employment.

### **Evidence in Court**

14. The Claimant's witness (CW1), Mary Wavinya Nduva testified that she used to work for the 1<sup>st</sup> Respondent from June 2016 and was undertaking labelling and documentation but currently she is unemployed.
15. The witness says that the 1<sup>st</sup> Respondent gave them the new contracts without informing them the details of the new company and those who refused to sign the contracts were terminated and not paid their dues.
16. CW1 testified that employees who refused to sign the new contracts were members of the union.
17. During cross examination, CW1 testified that subsequent to the transfer to Shalimar Flowers Limited, the new management, her responsibilities, salary and benefits remained constant.
18. CW1 testified that she was given the contract on 29/4/2020 and read and signed voluntarily on 21/5/2020 and that she consulted the union which told her to sign and it will follow up on payment of her dues.
19. CW1 testified that she is claiming for 4 years redundancy even though she did not lose the job or salary.
20. The Respondent's witness (RW1), Vitalis Osodo testified that he currently works as the group human resource manager for Shalimar Flowers since December 2017. Previously, he worked for the 1<sup>st</sup> Respondent which has the same directors as Shalimar Flowers which is a group of several companies with same directors.
21. RW1 testified that there was a process of having assets of those companies transferred to Shalimar Flowers during the Covid pandemic. The Respondents explained the transfer of contract to the employees and he advised them to contact management.
22. RW1 adopted his witness statement and list of documents dated 14/7/2023 and 13/10/2022 as his evidence in chief and exhibits A-F. RW1 testified that Mary Wavinya was an employee for Shalimar flowers and her employment came to an end a year ago. However, Waithaka is still working there.
23. RW1 testified that the contract the company was committing to take over accrued liabilities plus years served. All benefits accrued would not be affected and employees were given a chance to sign their document and Shalimar would pay all their dues and it was backdated to when they formed Wilmar.
24. RW1 testified that the union wrote to the Respondents about the issue, and respondent responded and the matter was referred to a conciliator who upheld the Respondents' decision.
25. RW1 testified that the Respondents' notified Kenya Plantation & Agricultural Workers Union of the transfers as they were in consultation.
26. RW1 testified that most of the employees are with Shalimar Flowers Limited and claimant witness No 1 has not approached the company for any dues and any dues to her can be paid; she has lost nothing and salary has continued to be paid.



27. During cross examination, RW1 testified that the Respondents did not notify the union of the restructuring as there was no recognition agreement. The Respondents expected individual members to inform the union.
28. RW1 testified that the Respondents informed Kenya Plantation & Agricultural Workers Union as it had a collective bargaining agreement with them and so they could engage directly. Only a few employees were members of the Claimant and the Respondents did not have a CBA with them.

### **Claimant's Submissions**

29. The Claimant submitted that the Respondents' defense case has failed the test of law and fact. The Respondents did not tender any certificate to demonstrate that there was a merger between Respondents and Shalimar Flowers (k) Ltd.
30. The Claimant submitted that there is evidence and proof that the grievants' employment came to an end after being transferred to a new employer trading as Shalimar Flowers (K) Ltd.
31. The Claimant submitted that the Respondent while admitting restructuring of their business activities failed in their mandate to invoke actions contemplated under the provisions of section 40 of [Employment Act](#), 2007.
32. The Claimant further submitted that the Respondents intentionally refused to involve union to participate in the purported restructuring exercise. The averments and allegations made by the Respondents that no employee lost any benefits in the said restructuring exercise must fail as the process did not comply with the law and the requirements of representational rights of all workers in Kenya.

### **Respondent's Submissions**

33. The Respondents submitted that the Claim was instituted on behalf of 32 employees and only 5 of them recorded witness statements. When the matter came up for hearing on 31<sup>st</sup> July 2023, the Claimant called only one witness, Mary Wavinya Nduva. There being no authorities of the other employees to mandate Mary Wavinya to appear and testify on their behalf, Mary Wavinya could only testify on her own behalf.
34. It was submitted for the Respondents that the failure to sign any such authority as required under the law renders the testimony of Mary Wavinya Nduva fatally incompetent and inadmissible as regards the other 31 employees on whose behalf she claims to be testifying. It relied on the case of Savala & another v Ndanyi (Environment and Land Case Civil Suit 248 of 2021) [2022] KEELC 2536 (KLR) (5 July 2022) (Ruling).
35. The Respondents submitted that the Claimant lacks locus standi to institute this claim on behalf of the 32 employees as there is no standing recognition agreement or CBA with the Respondents. Thus, the Claimant has not complied with Section 54 of the [Labour Relations Act](#), 2007 which provides for the recognition of trade unions for purposes of negotiating Collective Bargaining Agreements, they relied on Communication Workers -vs- Safaricom [2014] eKLR.
36. The Respondents submitted that Mr. Ongera appeared before this Court and purported to practice law and averred he was acting for the Claimant yet he is not an advocate of the High Court of Kenya. Mr. Ongera has no right to practice law and lead the witness, Mary Wavinya. His right does not go beyond what unrepresented person can do before this Court as set in Kenya Plantation & Agricultural Workers Union v Mahee Flowers Ltd (Cause E013 of 2021) [2023] KEELRC 1369 (KLR).



37. The Respondents submitted that redundancy entails loss of employment and abolition of office/ job/occupation at the initiation of the employer, however, in the instant case, the employees of the Respondents did not lose their employment as their jobs or offices were not abolished. CW1 testified that her work supervisor, role, duties and responsibilities did not change and that she did not suffer any loss of benefits and/or employment as a result of her transfer to Shalimar Flowers (K) Ltd.
38. The Respondents submitted that CW1 confirmed that all the transferred employees signed the contracts of employment with Shalimar Flowers (K) Ltd willingly and that they were given a chance to consult the Kenya Plantation and Agricultural Workers Union prior to their transfer. They relied on the case of Kenya Scientific, Research International Technical and Allied Institutions Workers' Union v Flame Tree Brands Limited & 2 others [2013] eKLR.

**Analysis and Determination**

39. The first issue for determination is whether the Claimant's has locus standi to institute this suit.
40. In the Court of Appeal case, Modern Soap Factory v Kenya Shoe and Leather Workers Union [2020] eKLR, the court held:

“The only issue that arises for determination in this appeal is whether a trade union has locus standi to represent its members in court in a dispute between an employee (who is member of the union) and an employer in the absence of a recognition agreement between the union and the employer. In other words, can a trade union that does not have a recognition agreement with an employer represent members of its union in court in a dispute between such members and the employer?

.....

..... In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court.

41. Article 41 of *the Constitution* of Kenya protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of *the Constitution* on enforcement of *the Constitution* provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where *the Constitution* is contravened or threatened with contravention. In the same spirit, Section 22 of the Employment and *Labour Relations Act* provides that:

“In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose.”

.....

42. A recognition agreement is defined under Section 2 of the *Labour Relations Act* as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis



upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct.”

43. The Respondents’ submitted that the Claimant does not have a recognition agreement or CBA between them hence lacks locus standi to institute this suit. It is not in dispute that the Claimant union represents the grievants who are/were employees of the Respondents herein and members of the union, therefore, the Claimant has locus standi.
44. Mr Ongera acted on behalf of the grievants as an official of the union and so the court finds he was legally mandated to so act.
45. The court however is disturbed by the fact that the claimant witness did not provide authority to act for the other grievants. However, for justice to be done I will accept their witness statements as per proviso of section 21 of the Employment and Labour Relations court (Procedure) Rules.
46. The Shalimar Flowers also informed the union of their decision to restructure their organisation and confirmed all employees had been issued with new contracts. This was by their letter signed on 8<sup>th</sup> May 2020 and they inquired for any other legal advise they needed to comply with. The respondents and their sister companies were therefore keen to comply with the legal requirements.
47. The second issue for determination is whether the restructure of the Respondents rendered their employees redundant under Section 40 of the Employment Act.
48. The Employment Act section 2 defines redundancy as:

“ the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”
49. CW1 testified that the Respondents informed the employees of their intention to operate as Shalimar Flowers Limited and extended to each of them new contracts under the new company. They then informed them that they would be paid any severance pay due to them. Further, they were given time to consult before executing the new contracts which they executed voluntarily after consulting the union. The respondent’s letter dated 27<sup>th</sup> April 2020 informed the employees of the change of company.
50. There was no loss of employment as CW1 testified and once her contract with Shalimar Flowers commenced she retained her supervisor, role, responsibilities, salary and benefits. All the employees received their new contracts and they signed voluntarily and accepted the terms and conditions. There was no loss of job and hence there was no redundancy and none of the employees were coerced to sign the new contracts.
51. The Respondents have satisfied this court that all the companies are the same in that they constitute the same directors and shareholders and all they did was to transfer all assets from the respective companies to Shalimar Flowers (k) Limited which is equally owned by the same directors.
52. The Respondents have equally maintained that they are willing to settle any unpaid dues and that none of the grievants have ever followed up on the same. This was confirmed by the claimant witness No 1. In her testimony she left her employment last year voluntarily and all she needs to do is to agree with Shalimar Flowers (K) Ltd of her dues and they have assured their employees they will pay them. Other employees are still working with this company to date. The claimants should agree with the respondents for settlement of any dues (if any).



53. In view of the foregoing, and having considered the pleadings, submissions and evidence adduced the court finds there was no redundancy declared on the employees as they continued to work and there were no job losses. The claim for redundancy dues for four years for the respective employees is not proved and is not merited. The claim is therefore dismissed and each party is ordered to pay their respective costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1<sup>ST</sup> DAY OF DECEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

