



**Kenya Union of Service Employers v Kamongo Waste Paper (K) Limited & another
(Cause E298 of 2021) [2022] KEELRC 1664 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1664 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E298 OF 2021
AN MWAURE, J
MAY 19, 2022**

BETWEEN

KENYA UNION OF SERVICE EMPLOYERS CLAIMANT

AND

KAMONGO WASTE PAPER (K) LIMITED 1ST RESPONDENT

RETAIL MANAGEMENT SOLUTIONS 2ND RESPONDENT

RULING

1. The claimant filed an application by way of notice of motion dated April 14, 2021 praying that the application be certified as urgent and be determined as an *ex-parte* application.
2. The honourable court be pleased to issue an interlocutory order staying or suspending 1st and 2nd respondents alleged move and intended redundancy and non-transfer and or non-payment of employee's benefits or liabilities as witnessed on documentation of both respondents on March 31, 2021.
3. An order also be issued staying the 1st respondent's undated memo requiring the employees to execute or sign new contracts and requisite resignation letters dated 31st april, 2021 and or any other date whatsoever pending the hearing and determination of this application and *status quo* before the said memo is maintained.
4. The honourable court to issue an interlocutory order compelling the 1st respondent to deduct and pay to the claimant union dues equivalent to the number of employees in check offs submitted to them and to continue doing so on the subsequent months when it is due to enable the claimant union offset its monthly financial obligations pending hearing and determination of this application.
5. The court be pleased to issue an interlocutory order quashing any decision and or resolutions made before, during and after pending hearing and determination of this suit.



6. The court be pleased to issue any order it may deem just and expedient.
7. Costs be provided for.

Claimant's Facts

8. The claimant avers that the claimant and the 1st respondent had no recognition agreement and when claimant applied for the same the 1st respondent arm twisted the claimant by transferring workers to another company without benefits after they were forced or coerced to resign.
9. The claimant union also avers that it has not been receiving its monthly union subscriptions and or dues on monthly basis upto March, 2021 as 1st respondent stagnated the process.
10. That 1st respondent in a dictatorship version forced the union members to sign new contracts with 2nd respondent with timelines.
11. So the claimant prays that the decisions and resolution by 1st and 2nd respondents via undated memo and contract dated 31st April, 2021 be quashed forthwith.
12. The application is supported by the supporting affidavit of Joseph Odhiambo dated April 13, 2021 the 1st respondent's Secretary General. He says that the union organised and recruited 156 employees of 1st respondent into the claimants union as members. He says thereafter they requested for deduction of union dues and recognition agreement on 12/1/2021 when respondent responded on March 20, 2021 indicating that they were still doing verification and authenticity of the names appearing on the check offs and were to respond once the process was finalised.
13. He says that in the meantime they received several calls from its members complaining of illegal transfers to a new company. The members did not know the fate of their benefits.
14. He says he wrote to the 1st respondent to explain and the 1st respondent responded that they did not have a recognition agreement with them hence we were not entitled to any response.
15. He says that as a result thereto they moved to court to protect their members' interests.
16. Similarly he says that the 1st respondent and 2nd respondents have colluded to defraud the claimant union or avoid deductions of union due thereby subjecting the union members to unfair labour practices by transferring the employees' services to an out sourcing agent and by changing terms of service to outsourced one.
17. He says they are entitled to union dues since January, 2021 after service of for "S" as required by the Labour Relations Act 2007 but the respondents are trying to block the union representing its employees who have acknowledged they are members of the claimant's union.
18. He prays the members be allowed to enjoy and participate in trade union activities including participation in collective bargaining agreement negotiations and other lawful benefits under the law and the constitution.
19. That the 1st respondent to proceed to deduct the union dues and remit to the union as by law required.

1ST Respondent's Claim

20. Nadim Mawji the Chief Executive Officer of the respondent deponed by his affidavit dated May 5, 2021 and stated the following:-



21. That the claimant contravened the provisions of section 62 and 74 of the *Labour Relations Act* 2007 by refusing to subject the dispute to conciliation under the Ministry of Labour and Social Services.
22. He further depones that out of 308 employees earmarked for transfer to the 2nd respondent 306 had resigned from the 1st respondent's employment and executed new employment contracts with the 2nd respondent from April 1, 2021. So any order he says issued to that effect would be in vain.
23. He says in view of the above the order to deduct the union dues is also overtaken by events.
24. He further says that there is no collective bargaining agreement between the 1st respondent and the claimant and the claimant has not achieved statutory simple majority member recruitment to warrant recognition.
25. The 1st respondent claims that they took over employees from Kamongo Waste Paper Limited in December, 2018 and that the 1st respondent offer primary operations in waste paper collection, management and recycling. So this involves receipt or collection of used or waste paper from third party vendors. He claims that meanwhile the claimant's union sector coverage is limited to janitorial services management consultancies among other related services.
26. He says the bulk of the employees are retained as drivers, turnboys and general staff and their primary duties is sorting and grading papers and loading and offloading goods.
27. He says that the claimant's member's sector is not in alignment with the claimant's sector coverage and so cannot validly represent the employee's issues.
28. He says he has no dispute with members dispute with members exercising their constitutional rights to belong to a union but would not want to see members join a union where they cannot be properly represented.
29. Further he says that the employees of respondent are 369 and so 156 who are the names given does not represent a simple majority which is 50 + 1 threshold.
30. Some 8 members listed in the list are not employees of the respondent.
That other 5 members are allegedly listed twice.
31. He says that they also contracted an outsourcing company to reduce on costs due to the covid pandemic and they gave their employees first priority to take up their jobs and hence the contracts with the 2nd respondent.
He says he had discussions with the employees before he gave them the letters of resignation and explained about the outsourcing process.
32. He says 306 out of the 308 employees earmarked for transfer have already resigned and taken up new contracts with the 2nd respondent.
33. The 1st respondent avers it is his right to organise its business operations and the claimant has no right to question the 1st respondent's business judgment. The 1st respondent therefore states that the claimant has not demonstrated any reasonable grounds to grant the orders sought.
34. The claimant's in his supplementary affidavit dated May 10, 2021 states that the alleged letters of resignation by the claimant's members were authorized and forced on them to sign and hence regards the 1st respondent as having acted in dictatorial manner.



35. He avers that terminal benefits are stolen from innocent tax payers and no notice was issued to the claimant's members or certificate of service. So he prays that the application dated April 14, 2021 be allowed as prayed.

2nd Respondent's Grounds Of Opposition

36. The 2nd respondent states that there are no legitimate grounds demonstrated to warrant it to continue participating in these proceedings. He says he has no collective bargaining agreement with the claimant.

37. He prays that the application dated April 14, 2021 should therefore be dismissed with costs.

38. The claimants response to the 2nd respondent. He says that the 1st and 2nd respondents conspired to render its employees redundant and then moved them to the 2nd respondent. He says all employees moved to the 2nd respondent are members of the claimant union.

The claimant also states that to represent its members it does not need to have a collective bargaining agreement between the union and an employer.

39. The court has perused carefully the submissions by the claimants and the respondents and also the authorities cited.

Decision

40. The prayers by the claimant are for an interlocutory order suspending the 1st and 2nd respondents from intended redundancy and transfer and payment of employees benefits. The court has found from the evidence summarised herein before in great details that no evidence at all that the 1st and 2nd respondent declared their employees redundant. Rather from April 1, 2021 the employees resigned and all 306 of them signed new contracts with the 2nd respondent. The respondents avers that in fact all the 308 employees have since signed their fresh contracts after resigning voluntarily.

41. There is no evidence given that the employees were forced to sign new contracts.

They have been in employment with the 2nd respondent since April 1, 2021 unless otherwise stated.

That definitely clearly shows there is no urgency to issue an interlocutory order staying the respondents actions as it is not proved that the employees were forced to sign new contracts. I tend to agree with the respondent's submissions that the prayer sought is overtaken by affluxion of time.

42. By the foregoing facts and going by the principles pertaining to the issuance of interlocutory orders set out in the case of *Giella vs Cassman Brown & Co Limited* (1973) EA 358 the court has not found evidence of irreparable harm likely to be suffered by the claimants which would not be adequately compensated by an award of damages.

43. The court has not been persuaded that the claimant has established both an infringement of a right and therefore finds it premature to grant the order prayed.

44. As for the averment by the respondent that the claimant failed to follow the conciliation process before filing the suit in court. I find that there was no bar to applying for interim orders in respect of procedures where they are warranted as observed in the case of [*Kenya Airline Pilots Association vs Kenya Airways Limited*](#) Cause No 2133 of 2015.

Therefore the court has jurisdiction to hear the application failure to refer matter for conciliation notwithstanding.



45. As for the issue of the deduction and payment of union dues equivalent to the number of employees in checks offs submitted to the respondent;-

I find there is no signed collective bargaining agreement by both the claimants and the 1st and 2nd respondents.

46. The part of a document produced in court by the claimants pages 46 – 52 annexed to their application is not signed by any of the parties nor is it dated.

Going by section 59 (4) of *Labour Relations Act* a collective bargaining agreement shall be in writing and shall be signed by the Chief Executive Officer of the employer, the Chief Executive or National Secretary of the employer organization that is a party to the agreement or a representative designated by that person and general secretary of any trade union or a representative designated by that person. The claimant has an opportunity to pursue the execution and registration of the collective bargaining agreement before the case proceeds for full hearing.

47. The parties failed to produce the executed agreement. Indeed the 1st respondent in response to the letter sent by the claimant forwarding the draft collective bargaining agreement wrote to the effect that they were unaware of existence of the said agreement.

48. The court would not wish to make orders that are not based on sound facts. If there is an agreement which both parties have consented to then it should be produced before the court. In absence of the same the court declines to give the prayer for interlocutory order compelling the 1st respondent to deduct and pay claimant union dues equivalent to number of employees in the check offs submitted to them and other related orders. The orders prayed in the application dated April 14, 2021 are therefore declined.

49. The court therefore orders that the case goes into substantive hearing of the main suit and so the 1st and 2nd respondent are ordered to file their response to the amended memorandum of claim dated April 27, 2021 within the next 14 days of this ruling and serve on the claimant.

50. Claimant is ordered to put a reply to the said response within 14 days if they so wish and thereafter parties to proceed to fix the matter for hearing without undue delay.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY, 2022.

ANNA NGIBUINI MWAURE

JUDGE

Delivered in presence of:

Javen holding brief for Mr. Adiyio for the 12th respondent.

Kukebe for the 2nd respondent.

claimant – Absent.

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 15th March 2020 and subsequent directions of 21st 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 Civil 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

