



**Kenya Union of Domestic, Hotels, Education Institutions, Hospital and Allied Workers (KUDHEIHA Workers) v Gathugu Secondary School & another (Cause E003 of 2021) [2022] KEELRC 1655 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1655 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E003 OF 2021  
MA ONYANGO, J  
MAY 12, 2022**

**BETWEEN**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS,  
HOSPITAL AND ALLIED WORKERS (KUDHEIHA WORKERS) ... CLAIMANT**

**AND**

**GATHUGU SECONDARY SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**PRINCIPAL/SECRETARY TO THE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant is a trade union registered under the provisions of the *Labour Relations Act*, 2007, whose mandate is to represent the interests of workers in Domestic, Hotels, Education Institutions and Hospital Sectors as more specifically set out in its constitution.
2. The Respondent is a public educational institution registered as Gathugu Secondary school under the *Basic Education Act*, 2013.
3. Through its Memorandum of Claim dated and filed in Court on 13<sup>th</sup> January, 2021, the Claimant avers that the Respondent has failed and/or refused to deduct and remit union dues contrary to the mandatory provisions of Section 19 of the *Employment Act*, 2007.
4. The Claimant further accuses the Respondents of failure to implement salary scales and allowances as per the DPM Circular of 2017 contrary to the *Basic Education Act*, 2013.
5. The Claimant avers that the Respondent's employees voluntarily and without coercion exercised their right of association by joining the Claimant and annexed forms marked as appendix 1 to the Memorandum of claim as proof of their membership.



6. The Claimant avers that it recruited a simple majority of the unionisable members of staff at the Respondent's establishment and as a result the Respondent is bound by the mandatory provisions of Sections 48 and 50 of the *Labour Relations Act*, 2007 to deduct and remit union dues to the Claimant.
7. The Claimant avers that the Respondent's failure to deduct and remit union dues violates the provisions of Article 41(1)(c) of the *Constitution* of Kenya, 2010 as read with Sections 4(1) and (2) of the *Labour Relations Act*, 2007 and *Conventions number 87* and *98* of the International Labour Organizations that recognize employees' freedom to join and participate in trade unions.
8. The trade dispute subject of the instant Claim was first reported to the Ministry of Labour and Social Protection in accordance with the provisions of Section 62 of the *Labour Relations Act* and a Conciliator appointed.
9. The Claimant avers that upon appointment, the Conciliator invited the parties for a conciliation meeting. However, the Respondent was uncooperative prompting the Labour Officer to issue a Certificate of Disagreement to the parties.
10. The Claimant thereafter filed the instant claim seeking the following reliefs: -
  - (i) The Respondent to be compelled to deduct and remit union dues as authorized on the signed Form S
  - (ii) The Respondent be instructed to implement salary scale and allowances as per the DPM Circular with effect from the date of the circular
  - (iii) The Claimant reiterates that the management should pay the monies owed to the union with his own monies
  - (iv) The cost to this suit and interest be upon the respondents
  - (v) The employer to be restrained from intimidating employees from withdrawing their membership to the union
  - (vi) Employer be compelled to negotiate with the union a Collective Bargaining Agreement within 60 days of signing the recognition agreement.
11. Contemporaneously with the filing of the Memorandum of Claim, the Claimant filed a notice of motion under certificate of urgency dated and filed in Court on 13<sup>th</sup> January, 2021, seeking the following orders: -
  - (a) That this Honourable Court be pleased to certify this Application as being urgent and allow the same to be heard on priority basis.
  - (b) That the Respondent be compelled to deduct and remit union dues as indicated under Section 48(2)(b) and Section 48(3) of the *Labour Relations Act*.
  - (c) That the Respondent be compelled to implement salary scales and allowances as per the DPM Circular of 2017 as per the Basic *Employment Act*, 2013
  - (d) That there is need to urgently secure the union rights and those of its members who are working with the Respondent.
  - (e) That the employer be found in contravention to fair labour practice by not observing the Article 41(5) of the *Constitution* of Kenya and Section 54(1) of



the *Labour Relation Act* whereby the employer has an obligation to recognize a trade union if the union represents a simple majority which the union does.

(f) That we pray the employer to be instructed to pay the union dues owed to this union with own money.

12. The application is premised on the grounds on the face of the application and is supported by the affidavit sworn by Albert Njeru, the Claimant's Secretary General on 13<sup>th</sup> January, 2021.
13. In response to both the application and the memorandum of claim, the Respondents filed a replying affidavit sworn by John M. Murage, the 2<sup>nd</sup> Respondent herein, on 23<sup>rd</sup> June, 2021 in which he denies any refusal by the Respondents to make union deductions and remittances as contended by the Claimant.
14. Mr. Murage maintained that the Claimant is a stranger to the Respondent given that there was no signed recognition agreement and is therefore unable to deduct and remit union dues as stipulated under Section 54 of the *Labour Relations Act*. He states that the union members can remit their union dues directly to the Claimant.
15. It was Mr. Murage's deposition that in the absence of a recognition agreement between the Claimant and the Respondent herein, the unionisable members could remit their dues directly to the union.
16. Mr. Murage denied the allegation that the Respondents had failed and/or ignored to implement salary scales and allowances as per the DPM circular of 2017 contrary to the *Basic Education Act*. He maintained that the salaries were regularly increased as required and annexed letters of salary increments marked as "JMM 1" to the Replying Affidavit.
17. Mr. Murage urged this Court to expunge from the Court record, documents he claims to have been illegally acquired from the school for the sole purpose of prosecuting this case.
18. In conclusion, Mr. Murage deposed that the claim and the application are without merit and should be dismissed with costs to the Respondents.
19. The parties agreed to proceed by way of written submissions.

### **Submissions by the parties**

20. On union membership the Claimant submitted that it had recruited a simple majority of the 1<sup>st</sup> Respondent's workforce as required under the provisions of Section 54 of the *Labour Relations Act* and proceeded to serve the Respondents with the signed Form S to commence the process of deduction and remittance of union dues.
21. It was the Claimant's submission that despite following due process the Respondents failed and/or refused and/or ignored to deduct and remit union dues as required by law and failed to sign the recognition agreement served by the Claimant forcing the union to report the trade dispute to the Ministry of Labour.
22. The Claimant submitted that the 1<sup>st</sup> Respondent being a Public School registered under the *Basic Education Act*, is bound by the provisions of the DPM Circular and failure to implement the same is unlawful. In support of this submission, the Claimant relied on the case of *Dadson Maina & 33 Others v Board of Management*, Nyeri Primary School [2017] eKLR.
23. In conclusion the Claimant urged this Court to find merit in its claim and allow it as sought.



## Respondents' Submissions

24. The Respondents submitted that in the absence of a duly signed recognition agreement, the Respondents had no authority to deduct and remit union dues as contended by the Claimant.
25. The Respondents further submitted that that the Claimant failed to furnish the Respondents with the signed check off forms and therefore any deductions made would be unlawful.
26. It was the Respondents' submission that the illegally obtained school documents obtained by the Claimant ought to be expunged from the Court record. In support of this submission, they relied on the findings in the case of *Okiya Omutatab Okoiti & 2 Others v Attorney General & 3 Others* [2014] eKLR where the Court expunged from its record documents that were illegally obtained.
27. The Respondents further maintained that some of the alleged members of the Claimant have since exited service with it and therefore the reliefs sought cannot be granted.
28. In conclusion, the Respondents urged this Court to find the Claim as filed without merit and to accordingly dismiss it with costs to the Respondents.

## Analysis and Determination

29. I have considered the pleadings and submissions filed by the parties. The issues in dispute in this suit are –
  - a. Whether the Respondent should remit union dues with respect to the nine (9) employees and members of the Claimant;
  - b. Whether the Claimant has met the requisite threshold to warrant the signing of a Recognition Agreement with the Respondent;
  - c. Whether the Claimant is entitled to the reliefs sought.
30. Before I embark on the analysis of the issues identified for determination, I need to deal with a preliminary issue raised by the Respondents with respect to expunging of illegally obtained documents.
31. The Respondents have pleaded in both the response and in the submissions that the documents illegally obtained by the Claimant ought to be expunged from the record.
32. Unfortunately, the Respondents have not identified the documents it alleges were obtained illegally and the reasons it has come to that conclusion. Nothing has been placed before this Court to show that if at all, any of the documents produced by the Claimant were confidential or that their access was restricted under password restriction or any such restrictions.
33. The Respondent has also not established what prejudice or harm it would suffer or has suffered from the production of the documents in Court. There has also been no proof of breach of privacy or of any law.
34. Rika J. in the case of *Leland I. Salano v Intercontinental Hotel* [2013] eKLR when similarly met with a request for the expunging of documents alleged to have been illegally obtained held as follows: -

“It has not been shown by the Respondent, that the documents the Respondent seeks to have expunged from the record were confidential, at the time Salano was in employment, or



that the Claimant had a duty to treat them as confidential. None of the documents contain any sign, or paragraphs, identifying them as confidential.

...

Whether the Industrial Court receives, or does not receive, evidentiary materials, is a matter of discretion. Section 20 of the *Industrial Court Act* Number 20 of 2011, states that, "in any proceedings, to which the *Act* applies, the Court shall act without undue regard to technicalities, and shall not strictly be bound by rules of evidence except in criminal matters." Under section 20 [4], the Court may require any person to produce any relevant document. The Court is not bound by the *Evidence Act* Cap 80 the Laws of Kenya, which has elaborate provisions on evidence that may relate to private or confidential information. The *Evidence Act* itself, under Section 182, states that, "nothing in the *Evidence Act*, shall be deemed to derogate from the provisions of any other written law which relate to matter of evidence....

.....The Court is of the view that these documents have not been shown to be confidential, or illegally obtained."

35. I agree with the findings of Rika J. Further, it is my finding that the challenge has come too late in the day and the Respondent ought to have moved the Court appropriately to ensure the same was determined at a preliminary stage. At this point, the documents are still on record, and it is too late to make an order to expunge the documents even if it were possible to identify them.

#### **Whether the Claimant has met the requisite threshold to warrant the signing of a Recognition Agreement with the Respondent**

36. Section 54 of the *Act* provides for recognition of trade unions as follows –

An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

37. It is therefore clear that for a union to qualify for recognition it must prove that it has recruited a simple majority of the employees of the 1<sup>st</sup> Respondent.
38. In the instant case, the Claimant pleaded that it had recruited more than 50%+1 majority of the 1<sup>st</sup> Respondent's employees. It produced the check off forms signed by 9 members.
39. The Respondents did not deny that the number of employees in the check off forms constituted a simple majority of unionisable employees of the Respondent. The only reason the Respondent gave for not effecting the check off deductions is that there is no recognition agreement between the Claimant and the 1<sup>st</sup> Respondent.
40. The Respondents' averment that the employees in the check off list have since left its employment is not supported by any evidence.
41. For the foregoing reasons, I find that the Claimant has on a balance of probabilities proved that it has recruited a simple majority of the unionisable employees of the 1<sup>st</sup> Respondent and is entitled to have the 1<sup>st</sup> Respondent compelled by this Court to sign the recognition agreement in terms of Section 54 of the *Labour Relations Act*.



**Whether the Respondent ought to remit union dues in respect of the 9 employees who are members of the Claimant**

42. Section 19(1)(f) and (g) of the *Employment Act*, 2007 obliges an employer to deduct from the employees' wages:
- (f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
  - (g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;
43. Further, Section 48(2) and (3) of the *Labour Relations Act* provides as follows –
- 2. A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—
    - (a) deduct trade union dues from the wages of its members; and
    - (b) pay monies so deducted—
      - (i) into a specified account of the trade union; or
      - (ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.
  - (3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.
44. It is not in dispute that there are nine employees who signed check off forms. The Respondents have alleged that their failure to remit union dues for the nine employees was due to the Claimant's failure to furnish the Respondents with the signed check off forms.
45. I find the allegation by the Respondents hard to believe given that the letter attached to the Respondents' replying affidavit as annexure 4 is actually the letter forwarding the check off forms. The letter is reproduced below –

The Principal

Gathugu Secondary School

O Box 889

Ruiru

Dear Sir/Madam

Re: Authority To Deduct Union Dues

Enclosed herewith, please find check off systems form No. 3422 signed by none (9) of your employees authorizing your establishment to deduct monthly subscriptions from their gross salaries/wages and remit the same to this Union, P.O Box 41763 – 00100, Nairobi or in a manner prescribed at the reverse of the signed form(s) as follows: -



1. K42967 – Everylne Mwihaki
2. K42963 – Peter Kamau
3. K42965 – Robert Nganga
4. K42966 – Naomi Wanjiru
5. K42969 – Lucy Wanjiru
6. K42970 – Hilda Wanja
7. K42971 – Paul Kiarie
8. K42964 – Peter Kimani
9. K42968 – David Gitau

This is in accordance with the Kenya Gazette Legal Notice No. 13572 dated 28<sup>th</sup> September 2012 (Section 48, 49 and 50 of Labour Relation Act, 2007).

The attached notice(s) of deductions becomes effective from March 2017.

Yours faithfully

Signed

Albert Njeru

Secretary General”

46. Indeed, by the letter dated 27<sup>th</sup> February 2021, Mr. J. F. Murage, the Principal, wrote an internal memo addressed to all subordinate staff and addressed them as follows: -

“ To All Subordinate Staff – Gathugu Secondary School

Internal Memo

We have received authority from Kudheihia Workers Union to deduct your monthly contributions on the behalf. However, kindly be advised that the School Board of Management has no legal contract with Kudheihia, and therefore we cannot make any deductions from your salaries on their behalf.

J. M. Murage

Principal/bom, Secretary”

47. I therefore find that the Respondents had a duty to remit union dues for the nine employees who joined membership of the Claimant and its failure to do so is inexcusable and contrary to the provisions of the *Labour Relations Act*, 2007.
48. The upshot is that the 1<sup>st</sup> Respondent is directed to immediately deduct and remit union dues of all employees currently in its employment who have signed check off forms.

#### **Whether the Claimant is entitled to the reliefs sought**

49. In view of the foregoing the Claimant is entitled to the following reliefs which I accordingly grant: -



- a. The Respondent be and is hereby restrained from intimidating employees from withdrawing their membership in the Union.
- b. An order is hereby issued directing the Respondent to immediately deduct and remit union dues of all employees currently in its employment who have signed check off forms.
- c. The Respondent is hereby directed to sign a recognition agreement with the union within 30 days.
- d. Given the nature of the relationship between the Claimant and Respondent, I will make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF MAY 2022**

**MAUREEN ONYANGO**

**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 [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.

**MAUREEN ONYANGO**

**JUDGE**

