



**Kenya Union of Water and Sewerage Employees v Tana and Athi Rivers
Development Authority; Union of Kenya Civil Party (Intended Interested Party)
(Cause E288 of 2021) [2022] KEELRC 1379 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1379 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E288 OF 2021
MA ONYANGO, J
JULY 5, 2022**

BETWEEN
KENYA UNION OF WATER AND SEWERAGE EMPLOYEES CLAIMANT
AND
TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY RESPONDENT
AND
UNION OF KENYA CIVIL PARTY INTENDED INTERESTED PARTY

RULING

1. Before me for determination is the Interested Party's Notice of Motion Application dated 29th June, 2021, seeking the following orders that: -
 - a) Spent.
 - b) This Court be pleased to grant stay Orders enjoining the Applicant/Intended Interested Party in the instant suit ELRC Cause No. E288 of 2021
 - c) This Court be pleased to issue orders vacating the interlocutory orders of 20th May, 2021 which had the effect of staying and suspending decisions arising from the memo of 26th April, 2021
 - d) This Court be pleased to Order that the Claimant/1st Respondent remits union dues wrongfully and unlawfully deducted from members of the Applicant/Intended Interested Party – TARDA Chapter, to the Applicant/Intended Interested Party and
 - e) The costs of this Application be provided for.
2. This application is premised on the grounds That:-



- a) The Applicant/ Interested Party is a trade union and a body corporate under the [Labour Relations Act](#), mandated with the representation of labour rights of Civil Servants within the Republic.
 - b) Contrary to the Claimant's/1st Respondent's assertions, it is legally and rightfully a representative of the 2nd Respondent who are civil servants.
 - c) It has over 200 members working in the 2nd Respondent's organization and who officially resigned from the Claimant's /1st Respondent's union and thereafter has attained the simple majority membership since the unionizable employees therein are about 330.
 - d) The Applicant/Intended Interested Party has fully complied with the necessary procedures by forwarding the resignation letters and application forms for the 200 members to the 2nd Respondent who has in turn forwarded the same to the Claimant/ 1st Respondent.
 - e) Despite resignation of the members from the Claimant/1st Respondent union and communication to remit union dues to the Applicant/Intended Interested Party, the 2nd Respondent has blatantly failed and/or refused to remit union dues and unlawfully continues to remit the said dues to the Claimant/1st Respondent's union.
 - f) There is in place a memo dated 13th January, 2021 from the 2nd Respondent's Managing Director, directing the employees to confirm their preferred unions.
 - g) Pursuant to the Memo, the 2nd Respondent's employees handed in their list of preferred unions, with over 200 members opting for the Applicant/Intended Interested Party Union.
 - h) There is another Memo in place dated 26th March 2021 from the 2nd Respondent to its employees to the effect that the 2nd Respondent had temporarily stopped deduction of subscription fees from the payroll, and directing the employees to make direct payments to their union of choice.
 - i) The 2nd Respondent continued to remit their dues to the Claimant/1st Respondent, thus subjecting the members of the Applicant/Interested Party to double remittances.
 - j) From the foregoing the Applicant/Intended Interested Party wishes to be enjoined in the instant suit ELRC Cause No. E288 of 2021.
 - k) The instant suit brought by the Claimant/1st Respondent with an intention to deny the members of the Applicant/Intended Interested Party an opportunity to join a trade union of their own choice, thus curtailing their Constitutional right to fair labour practices as enshrined in Article 40 of the [Constitution](#) of Kenya, 2010.
 - l) It is in the interest of justice that the Applicant/Interested Party be enjoined in this suit as the orders would adversely affect its members.
 - m) It is in the interest of justice that the Orders sought are granted.
3. The application is supported by the affidavit of JOseph Karanja, the Secretary, Tana and Athi River Development Authority (TARDA) Chapter, the Applicant/Intended Interested Party, sworn on 29th June, 2021. He avers that around 200 employees of the Respondent withdrew from the membership of the Claimant and joined the membership of the intended interested party.



4. That the ensuing wrangles for membership between the two unions informed the Respondent to issue the memo dated 13th January 2021 stopping union deductions which memo is the subject matter of the instant suit.
5. In response to the application the Claimant filed grounds of opposition dated 27th September, 2021 raising the following grounds: -
 - a) That the Application is frivolous, bad in law, vexatious and an abuse to the Court process.
 - b) The Court lacks jurisdiction to determine and grant the reliefs sought
 - c) That the Applicant deponent lacks Locus Standi to file the subject Application
 - d) That the Application is based on illegality
 - e) That the Application is an abuse of the Court process.
 - f) That the Application is therefore incompetent, fatally defective and does not lie and the same should be struck out and or be dismissed with cost.
6. The Claimant also filed a response to the application vide a replying affidavit sworn by Elijah Awach, the General Secretary of the Claimant on 28th September, 2021. In the replying affidavit, he avers that the affidavit sworn by Joseph Karanja on 29th June, 2021 is fatally defective for reason that it has been sworn by an unauthorized person in violation to the provisions of Sections 2(a) and (e) of the Labour Relations Act. He prays that the affidavit ought to be struck out with costs to the Claimant.
7. The Affiant further avers that no evidence has been availed by the Applicant to ascertain the alleged move of 200 of the Respondent's staff to the Applicant/Intended Interested Party's union.
8. He further depones that no evidence of the Constitution has been attached by the Intended interested Party to prove that the same permits the Respondent's employees to join membership of the Intended Interested Party union.
9. The Claimant contends that the Intended Interested Party has failed to bring to its attention the war in subscriptions, which in the Claimant's view have been brought about by the Intended Interested Party's encroachment into its sector thereby creating disturbance of its peaceful enjoyment or union representation in the water sector.
10. The Claimant denied any illegal remittances of union dues by the Respondent as alleged by the Intended Interested Party and maintained that it had met all the legal requirements as set out in Section 54 of the Labour Relations Act, 2007.
11. The Claimant further contended that it has a simple majority of unionizable staff and has on this basis negotiated several recognition Agreements and Collective Bargaining Agreements on behalf of unionizable members of the Respondent's staff.
12. The Claimant further argued that the Intended Interested Party being aware of an existent trade union within the Respondent's establishment went ahead to poaching thereby creating animosity to the Respondent's peaceful industry and the said union of choice.
13. The Claimant urged this Court to find the Application dated 29th June, 2021 by the Intended Interested Party devoid of merit and to dismiss it with costs to the Claimant.
14. The parties agreed to dispose of the Application by way of written submissions.



Submissions by the parties

15. In its submissions filed on behalf of the Intended Interested party/ Applicant maintained that it had met the threshold for the grant of the orders sought in the instant Application as highlighted in the supreme Court decision in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR on the threshold to be met while granting conservatory orders.
16. The Intended Interested Party further submitted that it has a simple majority in the Respondent's workforce having recruited a total number of 200 members of staff out of a possible 330. It is on this basis that the Intended Interested Party maintains that it has the locus standi to seek orders sought in the instant application.
17. The Intended Interested Party further submitted that the members having duly notified their employer of their intention to withdraw from a union in favour of the other is bound to abide by such instructions and make the necessary remittances to the union of choice. To buttress this argument the Intended Interested Party relied on the provisions of Section 48 (6) of the *Labour Relations Act* as read with Article 41 of the *Constitution* of Kenya, 2010.
18. In conclusion the Intended Interested Party/Applicant urged this Court to find merit in its application and allow it in terms of the reliefs sought therein.

Claimant's Submissions

19. The Claimant on the other hand submitted that the intended interested party's application dated 29th June, 2021 is incurable, untenable, vexatious and as a result ought to be dismissed with costs to the Claimant.
20. It is further submitted that the Application fails to meet the threshold for the grant of the orders sought.
21. The Claimant contends that the intended interested party has failed to avail evidence to this court to support its assertion that it has a simple majority of the Respondent's unionizable staff. Further that the intended interested party has failed that its official who swore the affidavit in support of the application, was authorized to do so contrary to the mandatory provisions of Section 2 of the *Labour Relations Act*, 2007.
22. The Claimant further maintained that the Interested Party's actions are in complete disregard to the existent Recognition Agreement and the Collective Bargaining Agreement in place between it and the Respondent herein. For emphasis the Claimant relied on the Court of appeal decision in the case of *National Union of Water and Sewerage Employees & 3 others v Nairobi Water and Sewerage Company Limited* [2018] eKLR.
23. On the issue of costs, the Claimant argued that the same should follow the event and therefore urged this Court to award the costs of this proceedings to the Claimant. To buttress this argument the Claimant relied on the Supreme Court decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR.
24. In conclusion the Claimant urged this Court to find the instant Application devoid of merit and to dismiss it with costs to the Claimant.



Analysis and Determination

25. After considering the application, affidavits and submissions on record and the evidence adduced the issues for determination are: -
- a) Whether the Intended Interested Party has met the threshold for joinder in this suit;
 - b) Whether the application dated 29th June, 2021 is merited

Whether the Intended Interested Party has met the threshold for joinder

26. Joinder of parties is provided for in Order 1 Rule 10(2) of the *Civil Procedure Rules* as follows: -
- (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
27. In the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR the Supreme Court set out the factors to be considered for joinder of Interested parties as follows –
- (a) What is the intended interested party’s stake and relevance in the proceedings? and
 - (b) Will the intended interested party suffer any prejudice if denied joinder?
28. Again, in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR Mativo J. observed as follows: -

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.

It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit in the case at hand be determined finally and completely to avoid litigating over the same matters again.”



Reliance has also been placed on the Muruatetu Case, where the Supreme Court of Kenya outlined the requisite elements to being joined as an interested party to a suit when it held thus;

“[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

29. In the instant suit, the Claimant seeks the following orders:-

- (a) A declaration that the action and or inaction by the Respondent on 26/3/2021 were unfair, and unlawful.
- (b) An Order compelling the Respondent to pay from its own Account the Claimant’s amount equivalent to the normal amount which it normally pays on monthly basis as well as the COTU percentage and the Nairobi TARDA Branch of the Kenya Union of Water and Sewerage Employees.
- (c) Costs of the suit
- (d) Interests on (b) and (c) above at court rates from the date of filing of suit till payment in full.

30. In the application filed with the claim, the Claimant prayed for the following orders;

- i. Spent.
- ii. That the Honourable court be pleased to issue an interlocutory order staying and or suspending any decision arising from the Respondent’s Memodated 26/3/2012 purportedly stopping the deductions and remittances of trade unions dues from the month of March 2021 to the applicant pending the hearing and determination of this application and status quo before the said memo be maintained.



- iii. The Honourable Court be pleased to issue an interlocutory order staying and or suspending any decision before, during and after which might result to the memo dated 26/3/2021 pending hearing and determination of this instant suit.
 - iv. The Honourable 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.
 - v. That pending hearing and determination of this Application, there be a mandatory order compelling the Respondent to deduct trade union dues and remit the same as usual to the claimant union.
 - vi. That cost of this Application be provided for.
31. In the affidavit and grounds in support of the application, the Claimant makes reference to another union having caused the Respondent to stop union deductions from its members. That other union is the Applicant herein.
32. Again, in the affidavit of Elijah Otieno Awach in support of the application, he depones at paragraph 3 and 6 as follows: –
- “3. That the Respondent and the Union of Kenya Civil Servants have colluded and invaded the claimant’s union sector with a sole purpose to unlawfully recruit our members into an estranged union thereby causing confusion in our industry unless restrained the claimant union stands to suffer irreparable loss which cannot be compensated by way of compensation.
 - 6. That I also wish to confirm that the claimant /union has ever been in the industry and or sector at all time and has negotiated several CBA’s with the Employer and the stranger Union being not in the sector should be barred permanently from encroachment into other sector thereby causing disruption of peace in the Objector sector and or disrespecting the constitution of the Applicant/claimant which is duly registered and rule 3 on membership explains who is eligible as well as the sectors covered by the applicant.”
33. This therefore means that the Interested Party has a stake in the outcome of this suit and there is need for it to be joined to his suit as orders may be made in this suit that would affect it. It is therefore a necessary party as its joinder is necessary for purposes of determining all the issues in the suit.
34. For the foregoing reason the prayer for joinder of the Union of Kenya Civil Servants is granted.
35. The prayers for conservatory orders are however premature, as the Interested Party must first prove the allegations made in its application that it has recruited about 200 employees of the Respondent into its membership. This is because the Claimant has recognition agreement and has negotiated several collective bargaining agreements with the Respondent, thus it has a right to protection by virtue of the recognition agreement.
36. The Interested party must further prove that its constitution permits it to represent employees of the Respondent as provided under Section 54(8) of the Labour Relations Act which provides: -
- (8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.



37. Although Article 41(2)(c) of the *Constitution* of Kenya, 2010 provides for the right of every worker to form, join or participate in the activities and programs of a trade union, this right is not a licence of any worker to join membership of any union, the *Labour Relations Act* provides for every union to have a constitution which must provide for certain matters, among them the objects of the union and the membership.
38. The same right is provided under Section 4(1) of the *Labour Relations Act*:
- (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.
39. *The constitution* and rules of the Applicant, the Union of Kenya Civil Servants provides for membership at Article 4 as follows:
- (1) Membership of the Union shall be open to employees in the Public Service of the Government of the Republic of Kenya, commonly known as “Public Servants” and whose remuneration is derived directly from estimates voted for by the Parliament of Kenya provide or from the Consolidated Fund of the Government of Kenya.
 - (2) Every member shall pay such amounts of prescribed monthly subscriptions as may from time to time be determined by the National Delegates Conference or Special Delegates Conference
 - (a) through check-off system; or
 - (b) by cash in advance annually at a rate to be determined by a National Delegates Conference.
 - (3) Upon admission to membership of the Union, a member shall be this Constitution, the Rules of the Union, the General Standing Orders i resolutions and decisions of the organs of the Union.
 - (4) Any subscription or other donations paid to the Union shall not refundable except where such subscription or donation was made in er and the final decision to that effect shall be made by the National Executive Board.
40. Article 1 of the said constitution assets its supremacy at Article 1A which provides:
- (i) This Constitution, and as it may from time to time be amended, is Supreme and its Provision shall have binding effect on all Members, Union Officials, Union Organs and Structures, and Employees of the Union.
 - (ii) The Provisions of this Constitution shall take precedence over and above any other rule(s) and/or regulation(s) of the Union or its Organs, where such rule(s), regulation(s) and/or Organs are inconsistent with the Provisions of this Constitution.
41. Further, Article 3 which sets out the objects and functions of the union provides at sub article 1(1) as follows: -
1. The object and functions of the Union shall be to –



- (a) to improve the relationship between employees and employers in the Public Service of the Government of the Republic of Kenya as specific in Article 4 of this Constitution;
- (b) to negotiate for better terms and conditions of employment for all Conference held every five years; Union members and unionisable employees of the Public Service;
- (c) to effectively represent the members of the Union in all grievances and disputes, and promote efficient settlement of disputes and grievances arising between employees and employers through conciliation, arbitration or otherwise and generally to safeguard the interest of the members.
- (d) to establish and maintain funds by means of membership subscriptions, contributions, levies and by borrowing on such security and on such terms as may from time to time be authorised or approved by the Advisory Council;
- (e) to seek and obtain legal, other professional and other consultancy services in the delivery of quality representation by the Union and /or in the defence of the rights of a member on matters arising out of the relationship with their employer, subject to the approval of the National Executive Board;
- (f) to collect and disseminate among members of the Union such statistical information concerning all matters affecting the Union or to print, publish and issue such papers, periodicals, books, circulars and other literature as may be seen conducive in the furtherance of the objectives of the Union;
- (g) strive and work towards ensuring guarantee job security and shall endeavour to seek facilities for its members and full-time employees of the union, to obtain education and training and also to improve the general welfare of members and the Union's full time employees;
- (h) the Union shall save at least 10% of its total revenue per month and create a reserve account, separate from the other Union Account(s), and utilize the monies to respond to any emergency that directly benefits Union members and/or acquire either by purchase, lease or otherwise any movable or immovable property or other assets. The review of the contribution towards the reserve account shall be done from time to time by the National Delegates Conference. Any withdrawals from the reserve account shall only be made with the Authority of the National Executive Board;
- (i) to collaborate with other workers unions in agitating for the improvement of labour legislation in order to be more beneficial to workers and for the repeal or amendment of unfavourable



legislation which have adverse effect on members and other workers;

- (j) to co-operate with other workers organisations on common issues and in solidarity for joint actions to promote and safeguard the interests of members and workers;
- (k) affiliate with the international confederations in the consolidation of workers solidarity globally;
- (l) in pursuance of these objectives, the Union shall do, or cause to be done such acts and things, as it considers necessary for the furtherance these objectives and generally to do everything to promote the interest all or any of its members or anything beneficial to the interests of the individual members of the Union;
- (m) to pursue other objects which a trade union may legally perform in the interest of its members and in the furtherance of the trade union movement.”

42. As has been submitted by the Applicant, the Respondent is established under Section 3 of the *Tana and Athi Rivers Development Authority*, Chapter 443 of the Laws of Kenya. It is established under Section 3 of the Act as a body corporate with perpetual successions and a common seal, capable in its corporate name of suing and being sued, taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property, borrowing and lending money, and doing or performing all such other things or acts for the proper performance of its functions under the Act as may be lawfully done or performed by a body corporate.

43. Appointment of staff of the Respondent is provided for under Section 9 as follows –

9. Appointment and remuneration of staff

- (1) The Authority may appoint, upon such terms and conditions as it thinks proper, such other officers and servants as it considers necessary or desirable for the efficient conduct and operation of its affairs.
- (2) The officers and servants appointed under subsection (1) shall—
 - (a) subject to this Act, exercise the powers and functions and perform the duties assigned to them from time to time by the managing director; and
 - (b) be paid out of the funds of the Authority such salaries as the managing director, with the approval of the Authority, may from time to time determine and other expenses as they may incur in the performance of their duties.

44. On the contrary, the civil servants are appointed by the Public Service Commission as set out under Article 234 of the *Constitution* of Kenya, 2010 among them to following:

- (2) The Commission shall—
 - (a) subject to this Constitution and legislation—
 - (i) establish and abolish offices in the public service; and
 - (ii) appoint persons to hold or act in those offices, and to confirm appointments;



- (b) exercise disciplinary control over and remove persons holding or acting in those offices;
45. In the instant application, the Applicant also seeks orders to stay and vacate the orders of this Court made on 26th April 2021 suspending the memo dated 26th April 2021 by the Respondent in which it communicated the decision to stop remittance of union dues.
46. I have considered the prayers in both the suit filed herein and the application by the Claimant both dated 6th April 2021.
47. It is my finding that the prayers to vacate the orders granted by this Court on 26th March 2022 can only be granted after the application provides first, that its constitution permits it to recruit into its membership employees of the Respondent and secondly, that a substantial member of the Claimant's members have resigned and joined its membership. This must be considered against the total number of employees of the Respondent.
48. Further, none of the parties have adduced evidence or what is being deducted from the employees who are alleged to have joined membership of the Claimant Union, whether it is union dues, or agency fees. The Court therefore needs to hear the evidence from the parties before giving directions on payment of union dues.
49. For these reasons, the only order, granted is that the Applicant be and hereby joined as an Interested Party in this suit.
50. There shall be no orders for costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 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 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, the 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 the 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

