



Kenya Union of Hair and Beauty Workers v Sana Industries Limited (Cause E420 of 2022) [2022] KEELRC 3871 (KLR) (25 August 2022) (Ruling)

Neutral citation: [2022] KEELRC 3871 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E420 OF 2022
AN MWAURE, J
AUGUST 25, 2022**

**BETWEEN
KENYA UNION OF HAIR AND BEAUTY WORKERS CLAIMANT
AND
SANA INDUSTRIES LIMITED RESPONDENT**

RULING

1. The respondent by its preliminary objection dated July 4, 2022 makes the following prayers:-
 - a. That this court lack jurisdiction to entertain the suit herein on account that the suit has been instituted prematurely.
 - b. The applicant has failed to exhaust all available dispute resolution provisions before lodging the present suit.
 - c. That the proceedings herein have been commenced contrary to law.
 - d. The dispute ought to, in the first instance, be lodged with the Ministry of Labour for conciliation pursuant to part VIII of the *Labour Relations Act 2007*.
2. The respondent did not file a supportive affidavit but filed submissions dated July 7, 2022.
3. The claimant filed a notice of motion dated July 6, 2022 made the following prayers:-
 - a. This application be certified urgent, it be heard ex parte and service thereof be dispensed with in the first instance.
 - b. The pending the hearing of this application interparties, the honourable court be pleased to issue an interim order directing the respondent to remit the sum of Kshs 450,000 to the claimant being unremitted union dues and agency fees for the month of May 2022 and the



same to be remitted to the claimant's bank account where it has been previously remitting ("the claimant's bank account").

- c. Pending interparties hearing of this application and the main suit, the respondent be ordered to continue deducting and remitting union dues and agency fees from its unionized and unionizable employees and remit the same to the claimant's bank account.
- d. The respondent be restrained from harassing, victimizing or terminating any of its employees on account of membership to the claimant or union activities pending hearing of this application interparties and pending hearing of this suit.
- e. Upon interparties hearing of this application the respondent be compelled to produce its payroll and other employees' records such as NHIF/NSSF records so as to enable a determination of its unionizable workforce and the proper and payable union dues and agency fees.
- f. This suit be fixed for hearing and determination on a priority basis.
- g. Costs of this application be borne by the respondent.

This application is what enacted the preliminary objection by the respondent.

Claimants case

4. The claimant avers are a registered CBA. they say then constitution allows them to recruit member from amongst unionsable workers in hair products manufactures in and related tracing institution to deal with hair products.
5. The claimant further states the respondent and the claimant have a recognitions agreement. He says there is also a valid agency agreement and a collective bargaining agreement.
6. The claimant avers the respondent had been deducting and remitting the union dues but without any valid reason it failed to remit the may 2022 dues. The same has been deducted from the members and respondent regards failure to remit the dues as an act of impunity.
7. The claimant claims it has been denied much needed revenue to continue functioning. He therefore depones this application in support of its application.

Respondent's submission

8. The respondent avers he intends to set off amounts dues to union with amounts due for payment as per section 50(5) of *Labour Relations Act*. He also submits the employer is offended by this application being filed before exhausting all available avenues hence leading to filing the preliminary objection. They rely on clause 3(c) (i) of the recognition agreement which provide that parties may refer dispute to the Ministry of Labour in accordance to the *Labour Relations Act* if they are unable to resolve a dispute.
9. Section 62 of *labour relations Act* also provide that the claimant may refer a dispute for reconciliation in the first instance. He says referring such dispute to the High Court denies the respondent opportunity or avenue to appeal if need be.
10. He further refers to section 73(1) of *Labour Relations Act* which provide that if a matter is not by concillation if can go to the High Court.



11. The respondent avers that section 74 of *Labour Relations Act* set out urgent referrals that may be referred to court direct. He therefore urges the court to uphold provisions of part viii of the *Labour Relations Act* as well as article 159(2)(c) of the *Constitution* and promote alternative forms of dispute resolution as a guiding principle.

Claimants Submission

12. The claimant in its submission, submits they are aware of legal provisions on conciliation and they signed an affidavit in accordance to section 5(3) of the *Employment Act*.
13. The affidavit explains why they did not revert to reconciliation because of the urgency of the issue. The employer used to remit Kshs 119,000/= and Kshs 450,000/= being union dues and agency dues respectively. The claimant says the respondent stopped remitting the union and agency dues for May 2022 and gave no reasons for withholding the same.
14. It is the claimants submission that the preliminary objection by the respondent is not merited

Decision

15. The court has considered the preliminary objection by the respondent challenging the jurisdiction of this court for the reason that the claimant failed to exhaust the alternative dispute resolution mechanism provided by the *Labour Relations Act* part VIII.
16. The reading of section 62 of the *Labour Relations Act* provide that a trade dispute may be reported to the Minister in the prescribed form and order. That provisions does not make it mandatory to refer a dispute for reconciliation but makes it preferred process. That provision does not preclude a party referring a trade dispute to court if necessary.
17. The Employment and Labour Relation Court cannot be robbed of its jurisdiction to determine trade dispute merely because the parties have not submitted the dispute to concillation. Section 12 of the *Employment and Labour Relations Court Act* gives the ELRC Court jurisdiction to handle *inter alia* disputes between an employer's organization and a trade union organization and also a trade union and a member thereof. The jurisdiction is intact.
18. Further in section 5(3) of *Employment and Labour Relations Court (Procedure) Rules, 2016* provide that if concillation has not taken place the statement of claim shall be accompanied by an affidavit sworn by the claimant or by the representative of the claimant attesting to the reasons why conciliation has not taken place.
19. The claimant deponed on June 17, 2022 affidavit of one Cecily Mwangi, the claimant's General Secretary and explained the urgency of the matter as the respondent had stopped remitting the union dues and the agency dues from May 2022 and the union was bound to stop its operations unless an urgent intervention took place.
20. The court finds the reasons given for filing the application in court by the claimant are plausible and cannot be ignored. On the other hand the respondent has not given any explanation as to why it stopped remitting the dues. On that ground the court finds the preliminary objection dated July 4, 2022 is not merited and is dismissed with costs to the claimant.
21. Orders accordingly.



Order

22. The respondent is given 14 days to respond to the claimants/applicant application dated June 17, 2022 and upon service the claimant applicant is ordered to file their written submissions within 14 days thereof and respondent can also file their written submission within 14 days of service of the claimants/applicants submission.

Mention on October 31, 2022 to confirm compliance and give a date for ruling.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH AUGUST, 2022

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

