



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kenya Engineering Workers Union v Rift Valley Engineering Limited (Cause E011 of 2020) [2022] KEELRC 4103 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4103 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE E011 OF 2020**  
**DN NDERITU, J**  
**SEPTEMBER 29, 2022**

**BETWEEN**  
**KENYA ENGINEERING WORKERS UNION ..... CLAIMANT**  
**AND**  
**RIFT VALLEY ENGINEERING LIMITED ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a memorandum of claim dated October 20, 2020 the claimant prays for the following-
  - 4.1 That the honourable court be pleased to find that the action of the respondent herein of lockout, redundancy, termination and or dismissal to be unfair, unprocedural and unlawful hence null and void.
  - 4.2 That the honourable court issues an order against the respondent to reinstate all the grievants herein without loss of any benefit.
  - 4.3 That in the alternative the honourable court to issue an order compelling the Respondent herein to pay the grievants herein all their terminal dues as per the parties CBA clause 15 and 28 and section 49(1) of the [Employment Act](#), 2007 on the following items:-
    1. One month notice pay in lieu.
    2. Services gratuity at 30 days for each completed year of service.
    3. 12 months gross salary as compensation.
    4. Accrued leaves and leave travelling allowances.
    5. Salary for worked days and not paid.



6. Overtime and public holidays if any.
  7. Salaries for the period they have been out of employment.
  8. Be issued with certificate of service.
2. In a response to the claim and counter-claim dated March 11, 2022 filed through Githiru & Co Advocates the respondent denied each and every material aspect of the claim and made a counter-claim.
  3. In the response/defence the respondent raised three preliminary issues in paragraphs 3, 4, and 5 as follows –
    1. Whether the claimant’s members called for an unlawful strike on November 3, 2017 and without any notice to the respondent?
    2. Whether the suit herein discloses any cause of action against the respondent herein?
    3. Whether the claimant members herein deserted their employment on November 20, 2017?
    4. The claimant filed a response to the preliminary objection (PO) dated the March 15, 2022 and filed a notice of preliminary objection of even date in regard to the counter-claim based on section 90 of the *Employment Act*.
    5. On March 30, 2022 this court directed that the preliminary objection by the respondent be heard and disposed of first before the preliminary objection by the claimant is heard. The court also directed that the said preliminary objection be canvassed by way of written submissions.
    6. Counsel for the claimant filed written submissions on May 30, 2022 while the respondent filed on May 18, 2022.

**ii. Submissions by counsel for the respondent**

7. In the submissions filed counsel for the respondent argues that the cause by the claimant is res judicata as the matters raised in this cause were allegedly heard and determined in Nakuru ELRC No 61 of 2018 – Kenya Engineering Workers Union v Rift Valley Engineering Ltd.
8. Counsel for the respondent argues that the aforementioned cause was heard and determined in 2019 and that the claimant was ordered to meet costs in the sum of Kshs 149,010/= which costs have not been settled. Counsel further argues that since the claimant has not settled those costs it should have no audience before this court.
9. However, other than the pleadings filed, the certificate of costs, and warrants of attachment, the claimant has not availed the proceedings and the judgment in Nakuru ELRC No 61 of 2018. There is no evidence to show and demonstrate that the said cause was heard and determined on merit.
10. There is no law or authorities cited by the respondent’s counsel to demonstrate that since the claimant has not paid the costs in the above mentioned cause that the claimant should not be heard or given audience in this cause.
11. The other ground raised by the respondent is that the claimant cannot act as a legal representative of the claimant and also as a party in the cause. Counsel argues that Mr Makale who has been ‘appearing’ for the claimant in this matter is not a qualified advocate and hence he has no capacity to ‘act’ for the claimant as if he is an advocate.



12. Counsel argues that while the claimant is legally entitled to file this cause for and on behalf of the grievants as its members, Mr Makale, or indeed any other officer or official of the claimant, who is not a qualified advocate, has no legal capacity to conduct matters in court.
13. Although counsel for the respondent has not addressed the following issue in the written submissions, the memorandum of appearance 'under protest' filed on December 3, 2021 the respondent states that this suit is not properly before the court as its registered name is Rift Valley Engineering Works Limited and not Rift Valley Engineering Ltd. What the respondent's counsel is understood by this court to be arguing is that although served with the pleadings in this cause Rift Valley Engineering Works Limited has entered appearance in protest as it is a stranger and/or improperly joined in this cause, and to the respondent named therein as Rift Valley Engineering Ltd.
14. The above assertion has not been responded to by the claimant either in the pleadings or in the submissions and the claimant has not sought to amend the memorandum of claim.
15. The certificate of registration for Rift Valley Engineering Works Limited has been filed as an exhibit by the respondent.

### **iii. Submission by claimant**

16. The claimant argues that under section 73 of the *Labour Relations Act*, 2007 and section 22 of the *Employment and Labour Relations Act*, 2016 the claimant has a legal right to represent the grievants herein and that Mr Makale or indeed any other officer or official of the claimant can appear in court to represent the grievants herein.
17. Further, the claimant has argued that the above two issues on representation were allegedly settled by the Court of Appeal in Mombasa *Civil Appeal No 37 of 2019 - Modern Soap Factory v Kenya Shoe and Leather Workers Union*.
18. On the issue of whether this cause is res judicata the claimant submits that Nakuru ELRC No 61 of 2018 was not heard and determined on merit. Further, the claimant alleges that it has appealed against the order on costs in ELRC Appeal No 25 of 2019.
19. The claimant argues that the issue of non-payment of costs in Nakuru ELRC No 61 of 2018 cannot in any way affect its right to be heard in the instant cause.

### **iv. Issues for determination**

20. Based on the pleadings on record and the submissions filed by both sides the following issues are presented for determination:-
  - a. Is the respondent a proper party in this cause, both in the claim and the counter-claim?
  - b. Is this cause res judicata?
  - c. Does the claimant possess the legal capacity to file this cause for and on behalf of the grievants named therein and to appear in court to prosecute the same?
  - d. Should the claimant be given audience by the court in this matter in view of the pending unpaid costs in Nakuru ELRC No 61 of 2018?
  - e. Costs.



#### **v. The respondent as a party**

21. As noted in an earlier part of this ruling the respondent entered appearance in this matter under protest and pleaded that the named respondent bears a different name. The respondent has attached a certificate of incorporation clearly indicating that its proper and registered name is Rift Valley Engineering Works Limited and not Rift Valley Engineering Limited.
22. The claimant did not respond to the above pleading and the evidence in the certificate of incorporation No XXXXXX filed as exhibit 1 by the respondent. The said certificate of incorporation is conclusive evidence of the name in which the respondent is legally known and recognized – see section 83 of the [Evidence Act](#) (Cap 80).
23. The claimant has not disputed the validity of the said certificate and has not sought to amend the pleadings to align the same with the legal reality that the party sued was intended to be the entity that filed an appearance under protest and known by official name in the said certificate.
24. The claimant has not applied to amend the pleadings or that there is an entity in the name of the respondent named in the pleadings as Rift Valley Engineering Limited.
25. As it stands the respondent who entered appearance under protest is not legally a party to this cause and consequently there is no cause to be heard against it before this court. There is no proper suit before the court between the claimant and the party who entered appearance under protest, Rift Valley Engineering Works Limited. Therefore, this cause cannot be salvaged under order 1 rule 9 of the [Civil Procedure Rules](#). The pleadings have already closed.
26. For the reasons stated above this cause is improperly before this court and the same is hereby struck out on that ground.
27. Likewise, if there is no legal entity in the name of Rift Valley Engineering Ltd and Rift Valley Engineering Works Limited who entered appearance has disowned that name, the counter-claim cannot stand as the same is improperly before this court.
28. A counter-claim is a suit of itself - see order 7 of the Civil Procedure Rules. If Rift Valley Engineering Works Limited intends to pursue the counter-claim it should file a proper cause in its proper legally recognized name and pursue the same to logical conclusion. As it stands Rift Valley Engineering Works Limited is not a party in this cause and it cannot therefore file a counter-claim in a cause wherein it is not a party.
29. For all the reasons stated above the counter-claim herein is also struck out for being improperly before this court.
30. With the striking out of the claim and the counter-claim this court may as well have stopped here but for completeness let me comment on the other grounds that were raised in the preliminary objection.

#### **vi. Is this cause *res judicata*?**

31. Although the respondent has argued that this cause is *res judicata* there is no evidence adduced to support that allegation and capable of satisfying the elements set out in section 7 of the [Civil Procedure Act](#) (Cap 21). No judgment and decree have been availed in that regard to confirm that indeed Nakuru ELRC 61 of 2018 was heard and determined on merits.
32. Other than the evidence of costs awarded to the respondent in that cause, which is not the same party as Rift Valley Engineering Works Limited that entered appearance in the instant cause under protest,



there is no evidence that that cause concerned the same parties or parties claiming under them and that the same issues raised in this cause were the same issues for adjudication and that the said issues in controversy were conclusively heard and determined on merits.

33. For the reasons stated above, had the respondent been a proper party in this instant cause, but this court has found above that it is not, this cause would not have been res judicata.

#### **vii. Audience for claimant**

34. Counsel for the respondent has vehemently argued that because the claimant has allegedly not paid costs awarded in ELRC No 61 of 2018 that the claimant should have no audience in this court in this instant cause. This court is lost as to why counsel has argued so. The respondent is free to use all available legal avenues to pursue the claimant for costs in that matter. What is the nexus between non-payment of the costs in that matter and the claimant being denied audience in this instant cause?
35. No binding authority or precedent has been availed or any law pointed out which could support that position taken by the respondent's counsel. This ground is unsubstantiated and unsupported and the same must fail. In any event, the 'respondent' who entered appearance under protest in this cause has been found not to be a properly and legally joined party in this cause.

#### **viii. Capacity of the claimant to file and prosecute this cause**

36. To the best of my understanding the respondent has raised two facets in this issue. The first issue is whether the claimant has legal capacity to file this cause for and on behalf of the grievants named in the memorandum of claim, and the second issue is whether Mr Makale, an officer of the union, or indeed any other officer or official of the claimant or any trade union, can prosecute a cause in court where such an official is not a qualified advocate as per the *Advocates Act* (Cap 16).
37. On the first issue, section 2 of the *Labour Relations Act* defines an officer and an official of a trade union or employers association as follows -
- ' Officer' when used with reference to a trade union or employers' organisation means a person employed by that trade union or employer's organisation.
- 'Official' when used with reference to a trade union or employers' organisation, means a duly elected official of a trade union or employers' organisation including a member of the executive and a branch official.
38. Section 22 of the *Employment and Labour Relations Court Act* provides as follows –
- ' 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 specifically authorised for that purpose.
39. My understanding of the foregoing provisions of the law is that a trade union or an employer's organisation has a legal right to 'represent' their members in court through an authorised officer or an official. The words officer and official have been clearly defined as above under section 2 of the *Labour Relations Act*.
40. In *Modern Soap Factory v Kenya Shoe and Leather Workers Union* the Court of Appeal held that a trade union has a right to 'represent' its members in court proceedings whether there is a recognition agreement or not between the union and the employer.



41. In the above decision, the Court of Appeal upheld the decision of Ndolo J in Mombasa ELRC No 615 of 2014. However, the central issue before the trial court and the Court of Appeal was whether a trade union can 'represent' employee(s) in court without a recognition agreement between the union and the employer.
42. But then, what does such representation entail in this context? article 258 (2) (d) of the Constitution provides that 'an association acting in the interest of one or more of its members' may institute proceedings in enforcement of constitutional rights. Article 41 of the Constitution on labour relations protects the right of every person to fair labour practices, including the right to join a trade union and taking part in the activities and programmes of such union.
43. In the understanding of this court what the Court of Appeal held is that a trade union can file a representative suit in its own name for and on behalf of its membership or part thereof. And that is the law as it stands, to the effect that a trade union has locus standi to institute claims, in its name, for and on behalf of its members.
44. However, the issue that counsel for the respondent has raised and which the Court of Appeal did not determine in the Modern Soap Factory Case (supra) is the extent to which such an officer or official of a trade union may 'represent' such members in court or 'prosecute.' a matter in court.
45. Counsel for the respondent argues that only persons qualified as advocates may prosecute matters in court representing their clients. Of course a party acting in person can represent his case in court and prosecute the same to logical conclusion. A juristic person may act through a director or a specially authorised employee for that purpose.
46. However, the claimant argues that under section 22 of the Employment and Labour Relations Court Act an officer or official of a union can represent and act for a party (employee) in court in the same manner and extent that a duly qualified advocate may act for a party in such a cause. Clearly, this issue was not dealt with by the Court of Appeal in the Modern Soap Factory Case (supra).
47. In the understanding of this court section 22 of the Employment and Labour Relations Court Act does not in any way elevate the officers or officials of trade unions who appear in court to the status of qualified advocates. What this section of the law envisages is that since the trade unions can file causes for and on behalf of their membership such officers and officials of such unions may appear for and on behalf of the union, not as advocates, but as officers or officials of such unions who are parties to such causes filed for on behalf of the members.
48. The Advocates Act (Cap 16) provides for persons who qualify as such advocates and further provides for other steps that such advocates shall take in order to represent parties in court such as taking out annual certificate after undergoing continuous refresher or professional development training each year.
49. Clearly and evidently, unless an officer or an official of a trade union has met all the requirements in the law, such officer or official does not qualify and cannot act for a litigant in court. Consequently, such an officer or official cannot and should not enjoy the privileges accorded to such qualified advocates.
50. Viewed through a different lense, this court may ask, can an officer or official of a trade union appear for a litigant in a cause in which the trade union wherein (s)he is such officer or official is not a party? The answer is unequivocal no. This is because the law and moreso section 22 of the Employment and Labour Relations Court Act envisages that such an officer or official only appears in court as such official or officer because the concerned trade union is a party in the proceedings and cannot act in person as it is a juristic person.



51. Such an officer or official cannot lead a witness in evidence in the same manner that a qualified advocate would do. It is advisable that unions do, as much as possible engage and instruct qualified advocates to represent the union in courts in conduct of such causes.
52. This court has come across many causes wherein pleadings are not properly drafted as presented in court due to the limited technical ability of the officials and officers of unions in drawing such pleadings where they are not qualified advocates. The art of advocacy is a skill that is based on training and practice which can only be executed by duly trained, equipped, and qualified persons under the *Advocates Act*.
53. With tremendous respect to officers and officials of trade unions, unless one is duly qualified as an advocate, under the *Advocates Act*, no such officer or official has legal capacity to represent and prosecute a case before any court on behalf of a litigant. This is why, while a duly qualified advocate can appear in any court for any party as instructed, an official or officer of a trade union cannot.
54. This matter has not yet come to court for hearing and hence what the respondent's counsel has submitted on this issue is premature. However, an officer or official of a trade union appearing in court can only go as far as a person acting in person can go as far court proceedings are concerned. Such officer or official, unless a qualified advocate, does not enjoy the same rights and privileges appurtenant to such qualified advocate.
55. This court has taken the liberty to deal with this issue as the same has come up in court again and again in numerous matters. The practical scenario for this issue to be canvassed and addressed is where and when the matter comes up in court for hearing and where an objection is raised, it should be dealt with then.
56. For the purposes of this ruling, this court categorically states that an officer or official of a trade union or employers organisation, unless a duly qualified advocate, does not and cannot enjoy the same rights and privileges available to a duly qualified advocate under the *Advocates Act* (Cap 16). The right opportunity for such issue to be raised is in court during the actual hearing of the cause.
57. A trade union or an employers organisation that files a cause in its own name for and on behalf of members does so as a recognised agent in accordance with order 9 of the Civil Procedure Rules. That does not and cannot in any way be deemed to elevate officers and or officials of such trade unions or employers organisations to the status of qualified advocates.
58. In the understanding of this court, and I so hold, there is no contradiction or obscurity between the provisions of section 22 of the *Employment and Labour Relations Court Act*, the *Advocates Act*, and order 9 of the Civil Procedure Rules. Only legally qualified advocates may practice law and hence represent parties in courts of law as per the instructions given. It is an offence for unqualified person(s) to act or purport to act as an advocate.

#### **ix. Costs**

59. Each party shall bear own costs of this cause.

#### **x. Order**

60. For all the reasons stated above this cause and the counter-claim are struck out and each party is ordered to meet own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**



.....  
**DAVID NDERITU**  
**JUDGE**

