



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAKURU**

**CAUSE NO. 217 OF 2018**

**KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**ELDAMA RAVINE WATER & SEWAGES COMPANY LIMITED...1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY WATER SERVICES BOARD.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF BARINGO.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Kenya union of commercial food & allied workers, the Claimant herein, filed a Memorandum of Claim dated 2<sup>nd</sup> July, 2018 suing the Respondents seeking to compel the respondents to pay, the 30 employees' salaries which remain unpaid for the last Twenty-five (25) Months and to remit the unions dues deducted by the respondents within those months.

2. The claimant avers that, the employees' salary that remain unpaid has accumulated to Kshs. 16,237,798.25 and the union dues have equally accumulated to Kshs54,315/-.

3. It is stated that the claimant has engaged the respondents severally but the engagement failed to bear any fruit, forcing the claimant to report an industrial dispute with the labour office who appointed a conciliator on 14<sup>th</sup> March, 2016 and several conciliatory meeting followed leading to a settlement, which was signed by both parties on 15<sup>th</sup> June, 2016 on terms inter alia that the salaries due shall be paid on or before 15<sup>th</sup> August, 2016.

4. It is alleged that, the respondents failed to perform their part of the agreement despite the several correspondences between them and visits at the 3<sup>rd</sup> Respondent's offices by the claimants' shop steward. Consequently, the claimant filed this suit seeking for this Honourable Court's redress, seeking the following Orders;

**1) That this court do order the respondents to pay the Kshs.16,237,798.25/- with interest of 14% per annum from the first month they failed to pay salaries.**

**2) Trade union dues amounting to Kshs. 54,315.00/- with interest at court rate.**

**3) That the respondents' actions be declared unlawful and unfair labour practices.**

**4) That the Honourable Court do order the respondent to remit all dues deducted to respective institutions within the provisions of the employment Act, 2007.**

**5) That the Honourable Court do issue any other order it deems fit to address the cause of justice.**

**6) Cost of this suit.**

5. The Claimant states that, the respondent's employees have not been able to access Corporative Sacco loans, and dividends as a result of the respondent's failure to pay the said salary arrears, therefore subjecting them to financial imbalance.

6. It is the claimant's case that, it has followed due process in pursuing justice on behalf of its members. Further that it has a valid recognition agreement dated 14<sup>th</sup> January, 2015 attached herein.

7. The 1<sup>st</sup> Respondent never filed an appearance in this case. The 2<sup>nd</sup> respondent was discharged from participating in this proceeding by this Court's Ruling of 18<sup>th</sup> October, 2018 leaving only the 3<sup>rd</sup> Respondent on board who filed its' response on 23<sup>rd</sup> July, 2020 through the firm of Gordon Ogola, Kipkoech and Company advocates.

8. The 3<sup>rd</sup> respondent opposed the entire claimant's claim. They denied the existence of a trade dispute and/or valid Recognition Agreement between the Claimant and itself. They denied that the 1<sup>st</sup> Respondent failed to pay employees' salaries for 25 months totaling Kshs.16,237,798.25/= and any failed engagement and allege that if there is any dispute which they deny, the said dispute is being negotiated in order to iron any differences and settle the matter within the law.

9. They denied any appointment of a conciliator, any meetings that took place and any settlement between the disputants herein and further denies any attestation of a settlement agreement on the 15<sup>th</sup> June, 2016 which terms included payment of the purported salary arrears on or before the 15<sup>th</sup> August, 2016 or correspondences alluded to thereafter.

10. The respondent denies existence of any CBA capable of enforcement by this Court and avers that the parties herein are still in the initial stages of recognition and their employees have not yet joined the Claimants' union as alleged or at all.

11. The 3<sup>rd</sup> Respondent states that, the Claimant has hurriedly filed the case while negotiations are ongoing to resolve the issue in total disregard to the explanation given to it of the predicaments facing the 1<sup>st</sup> Respondent. Further that, its' employees are currently being paid their monthly salaries and are able to access these services allegedly denied such as cooperative Sacco loan, dividends among others.

### **Submissions**

12. The parties herein agreed to dispose of this suit by way of written submissions with the 3<sup>rd</sup> respondent filing on 2<sup>nd</sup> March, 2021 while the claimant filed theirs on 29<sup>th</sup> March, 2021.

13. The claimant submitted that the 1<sup>st</sup> respondent has failed to pay the 30 employees' salaries for more than Twenty-Five (25) months which has now accumulated to over 16 million. Despite the claimant engaging the respondents severally, it is alleged that the respondent has been adamant to pay the said amount. Subsequently, a conciliator was appointed and an agreement signed between the parties on 15<sup>th</sup> June, 2016, which the Respondent continue to dishonor despite several reminders.

14. The claimant submitted that the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents are mandated by law to appoint the board of directors to the 1<sup>st</sup> Respondent, informing the joinder of these parties to the suit. Further that, the water service provision is a devolved function of the county government and that the 3<sup>rd</sup> respondent has been aware that the said employees have not been paid.

15. They thus submitted that the respondent's action has subjected the said employees to financial imbalance despite the fact that they continue to perform their duties. They urged this court to allow their claim as they followed due process before filing this suit.

16. The respondent on the other hand submitted that, the claimant reported the dispute to the Cabinet Secretary, Ministry of Labour by the letter dated 18<sup>th</sup> February, 2016 as "**failure to pay employees salary for Thirteen months**" and not 25 months sought in its' claim. In addition, the respondent argues that there was no conciliator appointed neither was there any conciliation proceedings between the parties herein as alleged by the claimant.

17. The 3<sup>rd</sup> respondent submitted that it was not made aware of any conciliation process as required under section 62 of the Labour Relations Act, 2007, neither have they exhibited any evidence in form of minutes of the purported conciliatory meeting, to affirm their allegations. They submitted that, there was no certificate of disagreement issued under section 69 of the Labour Relations Act, 2007 therefore the claimant failed to pursue the correct procedure before filing this suit.

18. It is the respondent's submissions that, rule 5 of the Employment and Labour Relations Court (procedure) rules, provides that any matter that is referred to court after a dispute before a conciliator; the claimant must attach a copy of the report by the conciliator together with the minutes of any meetings, which the respondent submits that none has been annexed herewith.

19. They reinforce their argument by citing the case of **Janet Mwacha Mwaboli –versus- Modern Soap Factory limited [2018] eKLR** where Rika. J held that;

**“Conciliation is therefore meant to be a binding and effective dispute resolution mechanism, with the Court's intervention sought, only when there are compelling reasons to do. Parties can only move to the Court under Rule 5 above. The Court needs to have the Conciliator's certificate, report and minutes of the conciliation meetings, to satisfy itself that conciliation has taken place; that the dispute is unresolved; that procedural requirements have been met; to assess if there are errors of law arising from conciliation process that require correction; and to satisfy itself that there are compelling reasons to hear the Parties afresh, and depart from, or affirm, the findings and recommendations of the Conciliator. Non-adjudicatory mechanisms are anchored on Article 159[2] [c] of the Constitution of Kenya. They must be taken as binding and effective dispute resolution mechanisms, not merely as stepping stones to the judicial forum.”**

20. They further relied on the case of **Kenya Game hunting & safari workers union –versus- Southern cross safaris limited [2014] eklr** which court held that;

**“The Claimant appears to have come to this Court prematurely. It initiated the conciliation process, but did not exhaust that process. Rule 6 of the Industrial Court [Procedure] Rules 2010, is a mandatory Rule, applying to all disputes which are subject to conciliation under the Labour Relations Act 2007.”**

21. Accordingly, the respondent submitted that the claimant did not subject the current dispute to conciliatory process before filing this suit as required under section 73 of the Labour Relations Act, 2007 as read with Rule 5 the Employment and Labour Relations Court (procedure) rules. Furthermore, a certificate issued by the conciliator as envisioned under section 69 (a) of the Labour Relations Act was not produced by the claimant neither did they attach a copy of a sworn affidavit explaining the failure to attach the said certificate. They thus submitted that, the claimant did not follow due process and this claim ought to be dismissed.

22. On the issue of existence of a valid Recognition Agreement, the respondent submitted that, there was a recognition agreement signed between the parties and the process of negotiation on the terms and conditions of the Collective Bargaining Agreement were under way and that a CBA had not been reached that conferred rights and obligations to the parties as provided for under sections 49, 57, 59(5) and 60 of the Labour Relations Act. Therefore, they argued that there is no CBA to be enforced by this Court or any other binding document between the parties with the force of law.

23. To buttress this argument, they relied on the case of **Kenya Union of Voluntary and Charitable Organizations (KUEVACO) –versus- Board of Governors & Maina Wanjigi Secondary School[ 2015] eklr** which court held that;

**“The evidence of lack of a Recognition Agreement and CBA, the claimants’ lacks standing before the Court.”**

24. They also relied on **Kenya private universities workers union –versus- Kenya Methodist university [ 2017] eklr** and submitted that in the circumstances where there is not collective agreement between the trade union and the employer, the rights and obligation of the employee would be determined based on individual employee contract of service. Consequently, they submitted that the lack of CBA Agreement between the parties meant that the 30 employees ought to have filed their suit individual and not be represented by the claimant who lacked *locus standi* to institute this suit on their behalf.

25. On the issue of deduction of union dues, the respondent submitted that, there is no CBA between the respondent and the claimant, further that the claimant has not served it with the check off forms requiring it to deduct the union dues from its’ employees’ salaries as provided for under Section 48 of the Labour Relations Act, 2007. They thus submitted that, it has not deducted any union dues from its employees as alleged by the claimant.

26. The respondent submitted that, the amount to be deducted and remitted to the union and the bank details of the union, ought to be set by the gazette notice from the ministry of labour as provided for under section 48 of the Labour Relations Act. They cited the case of **Kenya national union of nurses –versus- county public service board Homabay [ 2018] eklr** which Lady Justice Maureen Onyango held that; -

**“Having found that the applicant has not submitted check-off forms to authorize deduction of union dues, this application must fail. I accordingly dismiss the same on grounds that the Applicant has not proved that it is entitled to union dues which the Respondent has failed to deduct.”**

27. Finally, the respondent, submitted that it has been wrongly enjoined in this proceedings in that the claimant has failed to adduce any evidence to affirm its’ allegation that the 3<sup>rd</sup> Respondent is an employer of the claimant members. Further that it is a body corporate separate from the 1<sup>st</sup> respondent and that it does not have any binding relationship with the claimant, and urged this court to struck off this suit against them with costs.

28. I have examined all the evidence and submissions of the parties submitted before this court. The issues for this court’s determination are as follows;-

1. **Whether the claimants have locus to file this case for their members against the respondent.**
2. **Whether the 3<sup>rd</sup> respondent is rightly sued before this court.**
3. **Whether the claimant has established their case against the respondents.**
4. **What orders this court can grant in the circumstances.**

29. On issue No. 1, the 3<sup>rd</sup> respondent have submitted that there is a valid recognition agreement between the parties. The respondents however submitted there was no concluded CBA between the parties that would confer rights and obligations to the parties vide Section 49, 57, 59(5) & 60 of the Labour Relations Act. Section 49 of the Labour Relations Act 2007 deals with collection of agency fees by a Union that has concluded a CBA with an employer.

30. Section 51 is in relation to collection of levies other than Trade Union dues Section 59(5) 260 deals with regulation of a CBA.

31. These sections of the Labour Relations Act cited by the respondent have no nexus with whether the issue of locus for the trade union in

filing a claim on behalf of their members.

32. In my view issue of locus by members is based purely on membership and not registration of a CBA. Individual employees are also capable of joining a union without recourse to their employer and that is why Article 41 of the Constitution of Kenya states as follows:-

**“41. Labour relations**

**(1) Every person has the right to fair labour practices.**

**(2) Every worker has the right—**

**(a) to fair remuneration;**

**(b) to reasonable working conditions;**

**(c) to form, join or participate in the activities and programmes of a trade union; and**

**(d) to go on strike.**

**(3) Every employer has the right—**

**(a) to form and join an employers organisation; and**

**(b) to participate in the activities and programmes of an employers organisation.**

**(4) Every trade union and every employers’ organisation has the right—**

**(a) to determine its own administration, programmes and activities;**

**(b) to organise; and**

**(c) to form and join a federation.**

**(5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.”**

33. In the circumstances the submissions by the 3<sup>rd</sup> respondent that the claimant could not file a claim on behalf of the members is in my view unfounded.

34. On issue No. 2, the 3<sup>rd</sup> respondent indicated that they have been wrongfully enjoined in this case because they have no employer-employee relations with members of the claimant.

35. The claimant has however in the claim explained that the 3<sup>rd</sup> respondent was sued because they are mandated by law to appoint the board of directors to the 1<sup>st</sup> respondent and that water service is a devolved function of the County Government and that the 3<sup>rd</sup> respondent have been aware that the said employees have not been paid.

36. From the evidence submitted by the claimant such as minutes of the Special Meeting held on 28/3/2016 the 3<sup>rd</sup> Respondent was represented by the CA Water & Irrigation and CECM Water & Irrigation and in the minutes they made an appeal to the claimant for more time in order to settle all staff matters once and for all.

37. They urged the claimant to withdraw the strike notice. In all the communication about the dispute, the 3<sup>rd</sup> respondent was also well represented.

38. There is evidence that the claimant finally reported the existence of a Trade Union vide their letter of 18/2/2016. The 1<sup>st</sup> respondent was even aware of this and they responded to this vide their letter of 15/8/2016 explaining that they had no valid board in place and sought 2 months to fully mitigate the matter. The issue that the 3<sup>rd</sup> respondent are not properly before court is therefore not founded.

39. On issue No. 3, the claimant have established that they had valid issues to be raised with the respondents. They had various meetings with the respondents which appeared to bear no fruit. They finally reported the existence of a trade dispute which was also not resolved by the conciliator.

40. The claimant filed this claim on 3/7/2018. The 1<sup>st</sup> respondent failed to enter appearance nor file their defence.

41. The 3<sup>rd</sup> respondent on the other hand had an obligation to appoint a board for 1<sup>st</sup> respondent and the failure by the 1<sup>st</sup> respondent to perform their obligation was attributed to there not being a board in place.

42. The claimant presented evidence that the 1<sup>st</sup> respondent failed to pay salaries for their employees for 25 months all totaling 16,237,798.25 and for Trade Union dues of kshs.54,315. The respondent didn't respond to this claim and therefore the claim remained unquestioned or challenged.

43. It is my finding that the claimant has established his case against the 1<sup>st</sup> respondent with 3<sup>rd</sup> respondent sharing in liability for failure to put a board for 1<sup>st</sup> respondent in place.

44. In the circumstances I find for the claimant and I order that:-

1. 1<sup>st</sup> respondent to pay the claimants kshs.16,237,798.25/= being unpaid salaries.
2. The 1<sup>st</sup> respondent to remit to the claimant kshs.54,315/= being trade union dues.
3. The 1<sup>st</sup> respondent to remit all dues deducted to respective institutions within the provision of the Employment Act.
4. The 1<sup>st</sup> respondent will pay costs of this suit plus interest at court rates with effect from the date of filing this claim, the claim being a remunerative benefit.

The amount payable will be less statutory deduction.

DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF APRIL, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Kipkoech for 3<sup>rd</sup> Respondent – present

Claimants - absent