



**Kenya Petroleum Workers Union v Powerex Lubricants Limited (Cause E512 of 2022) [2024] KEELRC 748 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 748 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E512 OF 2022  
BOM MANANI, J  
APRIL 8, 2024**

**BETWEEN**  
**KENYA PETROLEUM WORKERS UNION ..... CLAIMANT**  
**AND**  
**POWEREX LUBRICANTS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a registered Trade Union representing unionizable workers in the petroleum oil and gas sector in Kenya. On the other hand, the Respondent is engaged in the business of petroleum oil products in Kenya.
2. The Claimant contends that in September 2020, it recruited nineteen (19) of the Respondent's unionizable employees. At the time, the Claimant avers that the Respondent had twenty five (25) unionizable employees. Consequently, it (the Claimant) contends that the nineteen (19) employees surpassed the threshold required for recognition by the Respondent as set under section 54 of the [\*Labour Relations Act\*](#).
3. The Claimant contends that it served the Respondent with the requisite check-off forms which had been executed by its new members granting their authority for deduction and remittance of trade union dues to it (the Claimant). Further, the Claimant contends that it served the Respondent with a Ministerial Order sanctioning the deductions. The Claimant also contends that it transmitted a draft Recognition Agreement to the Respondent for its signature.
4. It is the Claimant's case that despite the foregoing, the Respondent neither commenced deduction and remittance of trade union dues from the Claimant's members nor signed the Recognition Agreement. As a result, it (the Claimant) was allegedly forced to report a trade dispute to the Ministry of Labour.



5. The Claimant avers that the Ministry of Labour appointed a conciliator to resolve the dispute between the parties. However, the Respondent allegedly failed to attend the conciliation sessions leading to the collapse of the process.
6. The Claimant contends that the Respondent's actions have deprived its employees' freedom of association in contravention of the Constitution, the Labour Relations Act and various Conventions by the International Labour Organization. According to the Claimant, the Respondent's actions are inimical to the welfare of its employees.
7. As a result, the Claimant contends that it has been forced to move the court to, inter alia, seek orders to compel the Respondent to:-
  - a. Collect and remit trade union dues for its members from April 2021.
  - b. Execute a Recognition Agreement with the Claimant.
8. The Respondent does not admit the claim. It contends that it has forty two (42) unionizable employees. Therefore, the nineteen (19) employees that the Claimant alleges to have recruited do not meet the simple majority threshold that is set under section 54 of the Labour Relations Act to warrant the grant of the right of recognition.
9. The Respondent contends that the Claimant failed to furnish it (the Respondent) with its (the Claimant's) constituting documents. As such, it became impossible to ascertain the status of the Claimant for purposes of their engagement.
10. The Respondent further avers that despite the Claimant submitting check-off forms in March 2021, it did not submit a Ministerial Order to sanction deduction and remittance of funds from employees' salaries. As such, it was not possible for any deductions to be made.
11. In response, the Claimant asserts that the Ministerial Order and check-off forms were served on the Respondent by one John Ochieng Ouma, a licensed process server. That the said process server delivered the documents to one David Wachira, the Respondent's Managing Director.
12. In a rejoinder to this latter assertion, the Respondent filed an affidavit by David Wachira. In the affidavit, Mr. David Wachira admits that he has a work relation with the Respondent. However, he denies that he is the Respondent's Managing Director as asserted by John Ochieng Ouma. He avers that he only offers finance and tax consultancy services to the Respondent.
13. Mr. Wachira denies that he has an office in the Respondent's premises. He avers that his office is along Ngong' road, Nairobi and that he only visits the Respondent's premises on need basis.
14. Mr. Wachira denies meeting Mr. Ochieng at the Respondent's premises on 8<sup>th</sup> March 2021 as alleged by the latter. He denies that he was served with a Ministerial Order sanctioning deduction of trade union dues by the Respondent for onward transmission to the Claimant.

### **Analysis**

15. It is not in doubt that the Claimant is a registered Trade Union. This fact is self-evident from the Certificate of Registration appearing at page 45 of the Claimant's trial bundle dated 27<sup>th</sup> May 2022.
16. It is also not in doubt that the Claimant has the right to recruit members from the petroleum oil and gas sector in Kenya. Again, this fact is self-evident from the Claimant's constitution appearing at page 46 of the Claimant's aforesaid trial bundle.



17. Under section 48 of the *Labour Relations Act*, once a Trade Union has recruited more than five (5) employees from an employer's workforce, it can ask the Cabinet Secretary, Ministry of Labour to issue such employer with a Ministerial Order directing him (the employer) to deduct trade union dues from the affected employees and remit the cash to the Trade Union. The employer is obligated to commence deduction and remittance of the trade union dues within thirty (30) days of the Trade Union serving him with the Ministerial Order. It is therefore clear to me that the obligation on the employer to make trade union deductions only crystalizes after a Ministerial Order to that effect has been served on him.
18. The Claimant alleges that it served the Respondent with the Ministerial Order on 8<sup>th</sup> March 2021. It contends that this Order was forwarded to the Respondent vide the Claimant's letter dated 2<sup>nd</sup> March 2021 which was allegedly delivered by a Mr. Ochieng on 8<sup>th</sup> March 2021.
19. I have looked at the Claimant's letter dated 2<sup>nd</sup> March 2021. The letter reads as follows:-  
"The Managing Director,  
Powerex Lubricants Limited,  
Box 161-00606,  
Nairobi  
Dear Sir,  
RE: UNION DUES DEDUCTIONS (*LABOUR RELATIONS ACT* SECTION 48(1))  
Enclosed herein please find three (3) check off forms duly signed by nineteen (19) employees of Powerex Lubracants Limited who have acknowledged being members of Kenya Petroleum Oil Workers' Union.  
Kindly effect deductions of Union dues as stated in the check off forms. Deduction is effective from the month of March 2021.  
Your co-operation in this respect will be highly appreciated.  
Yours faithfully,  
George Okoth  
General Secretary"
20. Nothing in the letter suggests that a Ministerial Order was enclosed in it. What was sent to the Respondent were the check-off forms.
21. In the affidavit sworn by John Ochieng', he avers that the Claimant's General Secretary gave him the letter dated 2<sup>nd</sup> March 2021 together with a copy of the Ministerial Order to be delivered to the Respondent. I understand the purpose of the Claimant's letter under reference to have been to identify the documents which were to be delivered to the Respondent. If this was the intention of the letter, it is difficult to see why it alluded to the check-off forms but omitted to mention the Ministerial Order which was allegedly delivered alongside the check-off forms.
22. Further, in the affidavit sworn by John Ochieng', he avers that he delivered the documents to one David Wachira allegedly the Managing Director of the Respondent. However, the said David Wachira swore an affidavit denying such service. He denied that he is or has been the Respondent's Managing Director at any time.
23. David Wachira eventually testified in defense of the position that he expressed in his affidavit and was cross examined on it. He denied that he was even at the Respondent's premises on 8<sup>th</sup> March 2021



when he was purportedly served with the Ministerial Order. On the other hand, John Ochieng' did not testify in court in order to be cross examined on and defend his affidavit.

24. What is more, the law requires that the Ministerial Order under section 48 of the *Labour Relations Act* be served on the employer. The evidence on record shows that the order, if at all, was purportedly delivered to David Wachira who denies being in the Respondent's employment. He contends that he only serves as the Respondent's finance and tax consultant. Therefore, even assuming that the Ministerial Order was delivered to him, this cannot be said to have satisfied the requirements of the law that the Order be served on the employer.
25. The totality of the foregoing evidence casts doubts on the Claimant's contention that the Respondent was served with the Ministerial Order in order for it to commence deduction of trade union dues from the Claimant's members. For this reason, I find that there being no evidence that the Respondent was served with the Ministerial Order as required by law, it was under no obligation to commence deductions of trade union dues from its employees as from April 2021 as suggested by the Claimant.
26. Importantly, trade union dues are deductible from the salaries of employees who have become members of a trade union. These dues are not sourced from the employer's own resources. Therefore, it is doubtful that the court can issue an order to require the Respondent to backdate the collections to April 2021 as the employees' salaries for this period have already been paid out to them leaving the Respondent with no funds that are due to the employees from which the deductions can be made.
27. The only way that the Respondent can make deductions to cover back fees is if the employees agree to make payment from their present and future salaries to offset the arrears. This will require the express concurrence of the affected employees as an employee's salary is a protected entitlement which the employer has no right (except as sanctioned by law) to make deductions from without concurrence of the employee (see Part IV of the *Employment Act*).
28. The foregoing being the position, the Respondent can only be obligated to make trade union deductions from the affected employees from the date of this decision. This is because it (the Respondent) only learned of the presence of the Ministerial Order through these proceedings.
29. The next issue for consideration relates to whether the Claimant is entitled to recognition by the Respondent in terms of section 54 of the *Labour Relations Act*. For a Trade Union to seek recognition under this provision, it must demonstrate that it has recruited a simple majority of the employer's unionizable workforce. In simple terms, the Trade Union must demonstrate that it has secured 50% + 1 of the employer's unionizable workforce.
30. In its evidence, the Claimant avers that it has recruited nineteen (19) of the Respondent's unionizable employees. Therefore, it has attained the simple majority threshold that is set by section 54 of the *Labour Relations Act*. The Claimant's contention is anchored on the assumption that the Respondent's unionizable employees are twenty five (25).
31. The Respondent has disputed this contention. According to the Respondent, its unionizable workforce at the time that the Claimant wrote to it on 2<sup>nd</sup> March 2021 asking for recognition stood at forty two (42) individuals. Thus, the Claimant was yet to secure the requisite numbers to demand for recognition.
32. It is not in doubt that the Respondent's workforce is bigger than what the Claimant asserts. This fact is clear from the records of remittances by the Respondent to the National Social Security Fund (NSSF) and the National Health Insurance Fund (NHIF) which were tendered in evidence. The records show that the Respondent's employees are in excess of forty two (42) individuals. It (the Respondent) states that forty two (42) members of its total workforce are unionizable. Thus, the Claimant is yet to attain



- the threshold that is set by section 54 of the [Labour Relations Act](#) for it to be accorded recognition by the Respondent.
33. The Respondent has custody of the information regarding the individuals it has employed. In terms of section 112 of the [Evidence Act](#), if there is a dispute on this issue, the burden of proof lies with the Respondent to provide evidence to establish it.
  34. In my view, the Respondent discharged this burden by providing the aforesaid information in relation to its NSSF and NHIF remittances. Between the information provided by the Claimant and that provided by the Respondent on the issue, I am convinced that the information provided by the Respondent is more credible as it has custody of information on its employees.
  35. The court takes judicial notice of the fact that changes in an employer's workforce often occur with some employees leaving employment as new ones come on board. Therefore, it was not unusual for the lists of employees provided by the Respondent for the years 2021 and 2022 to have some variances.
  36. It is also perhaps important to point out that the 50% + 1 threshold that is required for recognition of a Trade Union is determined against the existing unionizable workforce for an employer at the point of the request for recognition by the Trade Union. Therefore, changes to employee demographics at the workplace between the time of the recruitment exercise by the Trade Union and the date of the request for recognition may impact on the statutory threshold.
  37. In the premises, I accept the Respondent's evidence that at the time that the Claimant asked to be recognized in March 2021, its (the Respondent's) unionizable employees were more than forty (40). In effect, the nineteen (19) employees that had been recruited by the Claimant did not meet the minimum threshold for recognition as set under section 54 of the [Labour Relations Act](#). As such, I decline to grant the Claimant's request that the Respondent be ordered to grant it (the Claimant) recognition.
  38. The Claimant is, of course, free to continue with the recruitment process in order to meet the threshold under section 54 of the [Labour Relations Act](#). Once this threshold is met, the parties are free to enter into a Recognition Agreement. Should the Respondent place obstacles in the way, the Claimant is free to approach the court afresh.

## **Determination**

39. For the foregoing reasons, I make the following findings and orders:-
  - a. That the Claimant did not serve the Respondent with the Ministerial Order under section 48 of the [Labour Relations Act](#) in March 2021. As such, the Respondent was not obligated to deduct and remit to the Claimant trade union dues from the latter's members as from April 2021.
  - b. That in the absence of proof of service of the Ministerial Order on the Respondent on an earlier date, the Respondent is deemed to have learned of the Order through the instant proceedings.
  - c. Consequently, the court orders that the Respondent commences making deductions of trade union dues from the Claimant's members and remitting the same to the Claimant from the date of this decision.
  - d. The evidence on record shows that the Claimant has yet to recruit the Respondent's unionizable employees that satisfy the threshold that is set under section 54 of the [Labour Relations Act](#). Consequently, the court declines to issue an order compelling the Respondent to recognize the Claimant for purposes of collective bargaining.



e. In order to foster industrial harmony, I order that each party bears own costs.

**DATED, SIGNED AND DELIVERED ON THE 8<sup>TH</sup> DAY OF APRIL, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

