



**Kenya Independent Commissions Workers Union v Independent Electoral and Boundaries Commission (Petition 181 of 2020) [2024] KEELRC 2864 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2864 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION 181 OF 2020**  
**JW KELI, J**  
**NOVEMBER 18, 2024**

**BETWEEN**  
**KENYA INDEPENDENT COMMISSIONS WORKERS UNION .... PETITIONER**  
**AND**  
**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner, a trade union registered by the Registrar of Trade Unions, vide amended petition dated 3<sup>rd</sup> October 2022 sought the following reliefs:-
  - a. A declaration does issue that the actions by the respondent in denying the petitioner reasonable access to its employees is illegal and unconstitutional and contrary to Articles 24, 27, 36, and 41 of *the Constitution* of Kenya, 2010.
  - b. AN ORDER restraining the Respondent and /or its agents from victimizing, intimidating, coercing harassing, persuading, and /or dissuading members of the Petitioner to leave the membership of the Petitioner.
  - c. AN ORDER awarding costs of the petition to the Petitioner.
  - d. Any other or further orders, writs, and directions this Court considers appropriate and just to grant for the purpose of the enforcement of the petitioner’s fundamental rights and freedoms.
2. The Petition was based on the grounds stated therein and supported by the affidavit sworn by Njeru Kanyamba of 3<sup>rd</sup> October 2022 annexing the documents relied on.
3. In summary, the facts of the petition were that the Petitioner was registered by the Registrar of the Unions and a certificate of registration dated 13<sup>th</sup> October 2016 was issued. Upon registration the Cabinet Secretary of Labour and Social Protection on the 12<sup>th</sup> of April 2017, issued *Legal Notice No.*



[91 of 2017](#) as authority for employers of independent commissions save for the category of workers of TSC and PSC exempted in the notice, to deduct union dues from the members of the petitioner and remit to the Petitioner's given bank account vide check off.

4. The petitioner stated that it sought to recruit members from the workers of the independent commissions according to the said legal notice including those of the respondent. The Petitioner submitted that it had several engagements with the respondent in the period between 2017 to 2019 seeking permission to engage its workers on a recruitment drive but the respondent denied the union access and had not granted their requests up to the time of filing the petition. (NK5 were copies of the correspondence). It was the petitioner's case that the denial of access to engage the employees of the respondents was a violation of the law and the constitutional principles of fair labour practices and prejudiced the employees' rights to be unionized.
5. The petition was opposed by the Respondent through the replying affidavit of Mahamud Jabane, its Manager of Legal Services, sworn on the 21<sup>st</sup> of January 2021. In a nutshell, the respondent's defense was that the petition was incompetent. That there was no evidence of the alleged victimization and harassment of workers. That the Respondent had not been served with evidence of recruitment of its employees in compliance with the provisions of section 48 of the [Labour Relations Act](#). That there was no specific Order by the Minister to the respondent to make deductions of union dues. The respondent stated it had invited the petitioner to its office for a discussion on the subject matter (MJ1 was the email of 26<sup>th</sup> January 2018). Jabane averred there was no recognition agreement between the parties for the union to access the employer premises for recruitment of its employees as stated under section 56 of the [Labour Relations Act](#) and that it had communicated that position vide letter dated 2<sup>nd</sup> March 2017 (MJ1). The respondent further stated the dispute ought to have been referred to conciliation in the first instance and for failure to do so it was bad in law.

### Written Submissions

6. The Petition was canvassed by way of written submissions. The petitioner's written submissions drawn by Nyandieka & Associates were dated 12<sup>th</sup> September 2023. The respondent's written submissions drawn by Munyao Mutham & Kashindi were dated 15<sup>th</sup> July 2024 and received in Court on an even date.

### Determination

SUBDIVISION 0- issues for determination

7. The Petitioner submitted the question for the Court to determine to be:-

Whether the actions of the respondent in denying the petitioner reasonable access to its employees are illegal and unconstitutional and contrary to Articles 24, 27, 36, and 41 of [the Constitution](#).
8. The Respondent raised the following issues for determination in the petition:-
  - a. Whether the petitioner should be granted access to the respondent's premises for purposes of recruiting union members; and
  - b. Whether the respondent has victimized, intimidated, coerced, harassed, persuaded and dissuaded the petitioner's members to leave the petitioner.
9. The Court having considered the pleadings of the parties and their written submissions and the law was of the considered view that the issues to be determined in the petition were: -



- a. Whether the Respondent had violated the law and *the Constitution* of Kenya on fair labour practices and the right of its employees to be unionized in failing to grant access of its employees to the Petitioner for recruitment as members.
- b. Whether the reliefs sought were merited.

**Whether the Respondent had violated the law and *the Constitution* of Kenya on fair labour practices and the right of its employees to be unionized in failing to grant access of its employees to the Petitioner for recruitment as members.**

10. The Court recognizes the right of the employees to join a union and to enjoy the benefits of unionization offered by the union which include representation at shop floor and collective bargaining. The right is anchored in international law, *the Constitution* and statutes. See Article 8 International Covenant on Economic, Social and Cultural Rights:-

“1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;” ;

11. The International Labour Organization Convention 87 (1948), Right to Organize and Collective Bargaining: Convention 98 (1949); Article 41 of *the Constitution* to wit:

”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.”



12. The *Labour Relations Act* section 4 to wit:-<sup>4</sup> 4. Employee's right to freedom of association (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 and section 5. "Protection of employees (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act." The Court has obligation to enforce the foregoing rights in its application of the law.
13. The foundation of the relationship between workers and unions is membership fees as envisaged under section 48 of the *Labour Relations Act* to wit:-<sup>4</sup> 48.1) In this Part "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership." It is this membership that gives the union locus to represent members. In the instant case, no evidence was placed before the Court of the employees of the Respondent being members of the Petitioner.
14. The procedure of membership is then prescribed under the section as follows:-<sup>2</sup> 2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—
  - (a) deduct trade union dues from the wages of its members; and
  - (b) pay monies so deducted—
    - (i) into a specified account of the trade union; or
    - (ii) in specified proportions into specified accounts of a trade union and a federation of trade unions."
15. In the instant petition, the petitioner vide affidavit of Njeru Kanyamba annexed as NK3, Legal Notice No. 91, being the Kenya Independent Commissions Workers Union (deduction of union dues) Order 2017 which ordered independent commissions within the Republic of Kenya save for the Teachers Service Commission concerning teachers who were members of KNUT and KUPPET and the Public Service Commission concerning an employee who is a member of Union of Kenya Civil Servants. The said Legal Notice was an Order to deduct on a monthly basis Kshs. 500 (specified in the schedule) from the wages of the employee who had subscribed to be a member of the Respondent. The Legal Notice was dated 12<sup>th</sup> April 2017 by Phylis Kandie, Cabinet Secretary for East African Community Labour and Social Protection.
16. On the 7<sup>th</sup> December 2017 the Ministry issued the Petitioner authority to use check off facility in the government payroll with check off code "552" for its members(NK4).
17. The petitioner annexed as NK5 various correspondence with the Respondent seeking access permission from the Respondent to recruit its employees. The deponent avers that the management of the Respondent denied it access to its employees and refused to make good the petitioner's requests. The case before the Court was that the respondent's action was in blatant violations of the law and constitutional principles of fair labour practice to the prejudice of its employees who are desirous and deserve the right to join and participate in activities of the union.
18. The response, in a nutshell, was that there exists no Order of the Minister under section 48 of the *Labour Relations Act* directing it to make deductions, and no recognition agreement according to the provisions of section 56 of the *Labour Relations Act*. Vide letter dated 2<sup>nd</sup> March 2017 the respondent had requested for recognition agreement with the petitioner and there was no compliance (MJI page 3 was the said letter). The respondent further stated on 26<sup>th</sup> January 2018 it had invited the petitioner to its offices to discuss the matter. The Respondent contended that if there was a trade dispute as



discerned from the petition, the issues should have been referred to conciliation in the first instance under section 62 – 74 of the *Labour Relations Act*.

19. The Court opined the germane of the petition was based on the averment by Njeru Kanyamba that the petitioner annexed as NK5 various correspondence with the respondent seeking permission from the respondent with a view of recruiting its employees as union members. The deponent avers that the management of the Respondent denied it access to its employees and refused to make good the petitioner's requests. The case before the Court was that the respondent's action was in blatant violation of the law and constitutional principles of fair labour practice to the prejudice of the employees of the respondent who are desirous and deserve the right to join and participate in activities so of the union.
20. The petitioner alleged unfair labour practices based on the constitutional right of association and right to join unions of employees. The petitioner relied on authorities on the right of association and right to join unions (Articles 36 and 41 of *the Constitution* respectively). Article 36 reads:- "36. Freedom of association
- (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
  - (2) A person shall not be compelled to join an association of any kind.
  - (3) Any legislation that requires registration of an association of any kind shall provide that—
    - (a) registration may not be withheld or withdrawn unreasonably; and
    - (b) there shall be a right to have a fair hearing before a registration is cancelled." Article 41 reads:-

"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. "
21. The respondent submitted it could only be obliged to meet the petitioner for the purpose stated of recruitment of its employees where there exists a recognition agreement under section 56 of the *Labour Relations Act* to wit :-
- "56. Trade union access to employer's premises
- (1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employers premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—
    - (a) recruiting members for the trade union;



- (b) holding meetings with members of the trade union and other employees outside of working hours;
  - (c) representing members of the trade unions in dealings with the employer; and
  - (d) conducting ballots in accordance with *the constitution* of the trade union.
- (2) An employer may—
- (a) impose reasonable conditions as to the time and place of any rights granted in this section to avoid undue disruption of operations or in the interest of safety; and
  - (b) require officials or trade union representatives requesting access to provide proof of their identity and credentials.
- (3) Any dispute concerning the granting of access, or the conditions upon which access is to be granted, may be referred to the Industrial Court under a certificate of urgency.”
22. The Court returns that there was no recognition agreement between the parties. Section 56 subsection 3 of the *Labour Relations Act* provides that disputes concerning the granting of access, or the conditions upon which access is to be granted, may be referred to the Industrial Court under a certificate of urgency. The Court discerned that a union can only invoke the court’s jurisdiction on granting of access to employer’s premises to recruit if it has a recognition agreement. A similar position was held in *Kenya Private Universities Workers Union v United States International University (2017)* e KLR where Justice Mbaru stated in Paragraph 15 : -“15. My reading of the above provisions is that access to the employer premises by the trade union is a matter that should be addressed in a Recognition Agreement. Such should address recruitment, holding of meetings, representations and conducting of ballots. The question of Recognition Agreement, how it is achieved, agreed upon and executed is addressed under section 54 of the LRA. Such is not a matter in issue herein but with the question of access to the respondent premises, the claimant ought to address the same before seeking access to the respondent premises through the court.”
23. The Court finds that access to employers’ premises before the recognition agreement is not a legal obligation. The granting of access to the union to the employer’s premises for recruitment purposes before the recognition agreement can only be at the unfettered discretion of the employer. The respondent to attain a simple majority to be recognized by the Respondent ought to devise ways of reaching the unionisable employees on its own and not necessary in the employers’ premises. The Court upheld a similar holding in *Kenya Private Universities Workers Union V Aga Khan University (2018)* E KLR where the Court relied on section 56 of the *Labour Relations Act* and upheld a preliminary objection to the effect that the law placed no obligation on employer to allow a union which had no recognition agreement to access the employer’s premises to recruit members to enter a recognition agreement.
24. In the upshot the court finds no legal basis for the entire petition.

**whether the reliefs sought were merited.**

25. The Court was perplexed by the Petitioner seeking orders against the victimization of its members while there was no annexed Form S as proof of membership or any other evidence before the Court of any of the employees of the respondent having joined the union as a members. None of the employees’ testimony was before the court. The Court returns that without proof of membership to



the respondent of any employee of the respondent, the issue of victimization or harassment or any violation of the employee's right to join the union cannot arise.

26. On the order sought to direct the respondent to deduct and remit union dues from its employees through check off system as directed in [Legal Notice No. 91 of 2017](#), the Court holds the prayer to be premature for lack of evidence of recruitment of employees of the respondent as members of the union.
27. In the upshot the Court returns that the petitioner put the cart before the horse. Without signed check off forms having been forwarded to the Respondent, the entire petition had no foundation. The petitioner ought to forward check-off forms signed by unionisable employees of the respondent who wish to join the union of which the respondent is bound to implement pursuant to the Order of the Minister allowing the union deductions from employees who are members. The court holds that there is no cause of action against the Respondent in the instant case.
28. The Petition as amended on the 3<sup>rd</sup> of October 2022 is dismissed for lack of merit. This being a constitutional petition the court makes no order as to costs.
29. It is so Ordered.

**DATED, DELIVERED, AND SIGNED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**JEMIMAH KELI**

**JUDGE**

In the presence of:

C/A- Caleb

Applicant/ Appellant – Ms. Muiruri h/b Nyandieka

Respondent- Winnie Songok

