



Institutes Staff of Kenya (UNRISK) v Pest Control Products Board (Employment and Labour Relations Cause 1812 of 2017) [2023] KEELRC 2093 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2093 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1812 OF 2017**

K OCHARO, J

JULY 27, 2023

BETWEEN

INSTITUTES STAFF OF KENYA (UNRISK) CLAIMANT

AND

PEST CONTROL PRODUCTS BOARD RESPONDENT

JUDGMENT

Introduction

1. This suit was commenced by way of a Statement of Claim dated 5th September 2017 wherein the Claimant sought the following orders: -
 - a. That the Honourable Court determines that the Respondent unlawfully refused to effect deduction of Claimant's check-off dues.
 - b. That the Honourable Court determines that, with 76% membership out of seventy-five (75) employees, the Claimant is qualified to be accorded a Recognition Agreement by the Respondent.
 - c. That the Respondent be and is hereby ordered to effect instant deduction of the Claimant's check-off dues.
 - d. That the Respondent be and is hereby ordered to sign a Recognition Agreement with the Claimant within thirty (30) days from the date of judgment.
 - e. That the costs hereof be paid by the Respondent.
2. Contemporaneously with the Statement of Claim, the Claimant filed a Verifying Affidavit sworn on 5th September 2017 and attached various documents thereto as evidence supporting its case.



3. In opposition to the Claimant's claim, the Respondent filed a Response to the Statement of Claim dated 16th October 2017 and a Witness Statement of one James Mwaura dated 30th November 2021.
4. On the 18th May 2022 when this matter came up for directions before this Court, the parties agreed that the matter be determined on the basis of the parties' respective pleadings and submissions.

Claimant's case

5. The Claimant avers that it is a Trade Union registered in Kenya in accordance with the [Labour Relations Act](#) 2007. It posits that it derives its mandate from its Constitution which was registered on 22nd January 2023, and which is attached to its Statement of Claim and marked "UNRISK-01", to serve all cadres of workers in all National Research Institutes and those providing services as are legislated under Sections 5 and 6 of the [Pest Control Products Act](#), Cap 346 of the Laws of Kenya.
6. The Claimant states that pursuant to its mandate, it recruited fifty seven (57) out of seventy five (75) employees of the Respondent. The employees who were recruited by the Claimant signed check-off forms prepared by the Claimant which were then forwarded to the Respondent under cover of the letters dated 9th August 2016 and 6th October 2016.
7. The Claimant's complaint against the Respondent is two-fold: -
8. Firstly, having recruited 76% of the Respondent's employees as its members it was entitled to be accorded recognition by the Respondent and, a Recognition Agreement signed between it and the latter, in line with the provisions of Section 54 (1) of the [Labour Relations Act](#), 2007. The Claimant avers that unfortunately, the Respondent failed to accord it such recognition despite the recruitment and the fact that no other rival Union was seeking recognition by the Respondent.
9. Consequently, the Claimant reported the matter to the Cabinet Secretary for Labour, who then appointed a Conciliator to attempt to resolve the matter. The Conciliator, one C. Otieno, prepared a Report dated 7th July 2017, where he found that the Claimant had indeed met the legal requirement for recognition by the Respondent and that no rival union was demanding recognition. The Conciliator recommended that the Respondent should recognize the Claimant.
10. The Conciliator emphasized that the Report dated 7th July 2017 was to be taken as a Certificate of Unresolved Dispute for use by either party, should they be unable to accept his recommendations.
11. Secondly, the Claimant complains that the Respondent, despite receiving the check-off forms that were signed by the fifty seven (57) member employees, the Respondent refused to effect check-off deductions for the said members and remit them to the Claimant, contrary to Section 48 (3) of the [Labour Relations Act](#), 2007.
12. The Claimant contended that it had met the legal requirements for the deduction of the check-off dues, by requesting the Minister to issue an order directing employers to deduct trade union dues from the wages of its members; and pay the monies to the Claimant and the federation of trade unions.
13. The Claimant states that the order was issued by the Minister through Gazette Notice Number 1270 of 2011 amended by the corrigenda at page 506 of the Kenya Gazette Vol. CXIII-No. 19 of 25th February 2011, both of which documents were attached to the Statement of Claim and marked "UNRISK-02".
14. Instead of deducting the union dues owed to the Claimant, the Respondent wrote to the Claimant a letter dated 17th August 2016, in which it insisted that parties should first sign the Recognition Agreement before addressing other issues.



15. Again, the Claimant reported the matter to the Cabinet Secretary for Labour; a Conciliator was appointed; and a Certificate of Unresolved Dispute was issued following the parties' inability to resolve the issue.
16. That the Claimant and Respondent reached a standoff as the Respondent insisted that the Claimant should obtain a check-off code to enable the deduction of union dues on the Government Pay-Check system, while the Claimant insisted that it was the Respondent's responsibility to obtain the said code and that it had done all that it was needed to do, present check-off forms to the Respondent.
17. The Claimant urged this Court to grant it the orders sought in its Statement of Claim dated 5th September 2017, as the Respondent's economic activity falls within its trade unionism mandate; it has met the legal/statutory minimums for grant of recognition, and there is also no rival trade union demanding recognition from the Respondent.

Respondent's case

18. On the Respondent's part, in its Response to the Statement of Claim dated 16th October 2017, the Respondent states that it was willing and ready to accord the Claimant recognition and execute a Recognition Agreement.
19. The Respondent stated that on 4th October 2016, it invited the Claimant for a meeting to discuss the issue of the recognition agreement and on 6th October 2016, wrote to the Principal Secretary, of the State Department of Agriculture requesting for a Legal Officer and a Human Resource Officer to be present in the meeting.
20. On the 10th of November 2016, it forwarded an application for authority to use the Defection Check-Off Facility of the Presidency Ministry of Devolution and Planning, Directorate of Public Service Management [IPPD Check-Off-0 [Revised January 2014]].
21. The Respondent asserted that as it was waiting for the approval to use the Check-Off system, it received a letter from the Chief Industrial Relations Officer, Ministry of East African Community, Labour and Social Protection on 17th November 2016, informing it that the Claimant had reported the existence of a trade dispute regarding failure by its management to effect union dues with effect from 1st September 2016.
22. The Respondent stated that subsequently, it received a directive from the Ministry of Public Service, Youth and Gender Affairs, State Department of Public Service and Youth, that the Claimant needed to meet the necessary and entire requirement for allocation of the check-off facility, by obtaining a Trade Unions Deductions Check-off Code in order to be accorded the benefits of the Government Pay-Checks system. The Claimant is yet to comply.
23. The Respondent contends that it is necessary for the Claimant to make a formal request to the Labour Minister for the use of the Check-Off code as provided for in the *Labour Relations Act*. The Respondent has no authority to make an application for deductions on its behalf.
24. The Respondent took the view that this suit was filed prematurely, and unnecessarily as the failure to sign a Recognition Agreement, and the failure to deduct and remit trade union dues, was occasioned by the Claimant's own refusal to meet the necessary requirements.
25. In the Witness Statement dated 30th November 2021, by James Mwaura, the Respondent's General Manager Cooperate Services, hereinabove alluded to, the witness denied that the Claimant did meet



- the threshold for Recognition under Section 54 (1) of the [Labour Relations Act](#) 2007, as it recruited some employees who were not unionisable. The alleged 76% was, therefore, a misrepresentation.
26. Further, since the recruitment, the Organizational Structure of the Respondent has changed with the current establishment having ten [10] job grades as opposed to the earlier 15, the total number of staff has since changed, currently, the Respondent has a total of 68 employees.
 27. In addition to the foregoing, the Respondent avers that some Form S submitted by the Claimant did not have signatures attached to names of members; were not compliant with the law as they did not include membership numbers of the alleged members, and were tainted with allegations of fraud.
 28. The Respondent also avers that the Claimant is not the most appropriate union for the unionisable staff of the Respondent, as the Respondent is a regulatory body with no Research mandate. It is not a research institute.
 29. On the order issued by the Minister for deduction of trade union dues and remittance to the Claimant, the Respondent avers that the order contained in the Gazette Notice relied on by the Claimant was issued way back on 25th November 2011, long before the Claimant recruited members from the Respondent's ranks. The Respondent believes that the Claimant should make a specific application and obtain a specific order relating to the Respondent's employees.
 30. For all the above reasons, the Respondent urges this Court to order for the Claimant's recruitment of its employees to be conducted afresh, and for the suit to be dismissed with costs.

Claimant's Submissions

31. The Claimant filed submissions dated 20th June 2023, wherein it submits that this Honourable Court has jurisdiction to hear and determine this case under Section 12 of the [Labour Relations Act](#), 2007.
32. The Claimant submits that it met the legal threshold under Section 54 (1) of the [Labour Relations Act](#), 2007 by recruiting fifty seven (57) employees of the Respondent. At the time when the labour dispute was declared, the Respondent had 75 employees, making the Claimant's membership 76% of the Respondent's employees, hence far above the statutory simple majority.
33. Pursuant to the foregoing, the Claimant submits that it should have been accorded Recognition by the Respondent. Following such Recognition, deductions ought to have been made from 1st September 2016, from its members and remitted to it and COTU, in line with the Ministerial Order contained in Gazette Notice No. 1270 of 2011.
34. The Claimant was categorical that the Respondent's economic activity automatically fell within its mandate per Section 3 of its Constitution.
35. The Claimant cited ELRC Cause No. 1239 of 2017 at Nairobi [Union of National Research Institutes Staff of Kenya v Kenya Industrial Property Institute](#) to support its position.
36. The Claimant urged this Court to find in its favour for the above reasons.
37. On costs, the Claimant invoked Rule 29(2) of the [rules of the Court](#), Legal Notice No. 146 and prayed for reasonable costs as the Claimant is a litigant in person.

Respondent's Submissions

38. The Respondent filed submissions dated 17th June 2022.



39. The Respondent submitted that the Claimant has not met the threshold for recognition under Section 54 (1) of the [Labour Relations Act](#) 2007 for the reasons set out in its Witness Statement dated 30th November 2021 and its Pleadings.
40. In support of its submission that the recruitment process of the Claimant ought to be conducted afresh, and this suit dismissed with costs, the Respondent cited the Court of Appeal case of [Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union](#) [2016] eKLR, which held as follows in relation to recognition: -

“To be recognized as the representative trade Union of the workers of a person or entity, Section 54 of the [Labour Relations Act](#) stipulates that the minimum number of workers willing to join the union must be a simple majority or 51% of the workforce.”

Issues for Determination

41. Having reviewed the pleadings, evidence and submissions herein, I find that the issues for determination are as follows: -
- a. Whether the Respondent should Recognize the Claimant as the representative Trade Union of its workers;
 - b. Whether the Respondent should effect check-off deductions from the Respondent’s employees and remit them to the Claimant.

Whether the Respondent Should Recognize the Claimant__

42. Before I delve into this, issue, I find it imperative to point out that this Court notes one vital issue, which issue it must consider though not raised in the parties’ submission. I have carefully considered the averments in the Response to the Statement of Claim filed by the Respondent herein. In my considered view, as regards the recognition of the Claimant, there is a clear admission.

43. In paragraph 4 of the Response, the Respondent stated;

“ 4. The Respondent denies the Contents of paragraph 4 of the Statement of Claim and states the Respondent was willing and ready to accord the Claimant a Recognition Agreement.”

In order to put this view in perspective, it becomes imperative to bring forth what the Claimant had pleaded in paragraph 4, referred to by the Respondent in its pleadings, thus;

“Despite the fact that the Claimant had recruited fifty-seven [57] members representing 76% of the Seventy-five [75] total of the Respondent’s employees “she [the Respondent] never accepted to accord the Claimant recognition voluntarily as per the compulsory written law requirement under Section 54[1] of the [Labour Relations Act](#), 2007.”

44. It is my view, that the fact that the Claimant had recruited 76% of the Respondent’s unionisable members was equally admitted by the Respondent.

45. I have carefully considered the Respondent’s witness’s statement, undoubtedly, it is radically at variance with the Respondent’s pleadings. For instance, the witness contends therein; that the 75 employees included non-unionisable employees, and therefore the 76% membership alleged was a misrepresentation; that the list of the alleged members of the Claimant union didn’t comply with the



law; that the Claimant is not an appropriate union for the uninhabitable staff of the Respondent; that the total number of the Respondent's staff has changed to 68 employees; that the Claimant was requested to amend the draft Recognition Agreement, but failed to do so and; that the recruitment exercise by the Claimant was marred with allegations of fraud.

46. It is trite law that parties are bound by their pleadings and nothing can turn on any evidence that is at variance with a party's pleadings. Consequently, I disregard the contents of the witness's statement [turned evidence in chief] to the extent that they are at variance with the Respondent's pleadings. In support position, I rely on the case of *David Sirona Ole Tukai v Francis Arap Muge & 2 others* Civil Appeal No. 76 of 2014 [2014] eKLR where the Honourable Court of Appeal held thus;

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

47. The Respondent denies that the Claimant is not the most appropriate union to represent the Respondent's workers as it [the Respondent] is a regulatory body with no research mandate. I am not persuaded by this position taken, first for the reason that it is not in line with the tone of the Respondent's pleadings, and second, for the reason demonstrated hereunder.

48. The Claimant's Constitution that was presented before this Court clearly sets forth its mandate. Rule 3 thereof stipulates;

“This trade Union is established to serve all cadres of workers in all National Research Institutes and those providing similar services...”

49. Despite the assertion that it is a regulatory body, the Respondent didn't place forth any material from which its objective and or functions can be deduced. However, a cursory inspection of the Respondent's website, which I take judicial notice of, indicates that the Respondent's Mission is to provide an efficient and effective regulatory service for importation, exportation, manufacture, distribution, transportation, sale, disposal and safe use of pest control products and mitigate potential harmful effects to the environment.

50. Under the heading “Operational Objectives”, the following are listed: -To increase public awareness of the PCPB activities.To enhance the public image of the PCPB.To promote and sustain good leadership.To ensure proper siting of manufacturing and formulating plants and sumps for containment of effluents.To compile and maintain an inventory of obsolete and expired chemicals, used containers and develop strategies for their disposal.To ensure only qualified personnel handle restricted pest control products.To evaluate and register pesticides safe to plants, animals, users and the environment.To collaborate with relevant agencies in evaluating the risks of pesticides to humans, environment and non-target organisms.To monitor the quality of pesticides within the distribution chain.To regulate volumes of importation of pesticides regulated under international conventions e.g. Rotterdam, Basel and Stockholm Conventions.To train pest control product dealers on legal requirements for the manufacture, procurement, storage and sale of pesticides.To enhance the frequency and coverage of inspection services.To facilitate training on the safe use of pest control



products for stakeholders. To ensure timely investigation and prosecution of *Pest Control Products Act* offenders. To enforce the use of approved labels. To improve information dissemination to stakeholders.

51. I note that some of the Respondent's operational objectives are to compile and maintain an inventory of obsolete and expired chemicals, used containers and develop strategies for their disposal; to evaluate and register pesticides safe to plants, animals, users and the environment; to collaborate with relevant agencies in evaluating risks of pesticides to human, environment and non-target organisms; and to monitor the quality of pesticides within the distribution chain.
52. I am satisfied that while the Respondent's core mandate is regulatory, it carries out some research activities, and therefore falls within the mandate of the Claimant Trade Union. Its workers may therefore be represented by the Claimant. I agree with the finding in *Union of National Research Institutes Staff of Kenya v Kenya Industrial Property Institute* [2022] eKLR in this regard.
53. In explaining the failure to recognize the Claimant union the Respondent further asserted that the former failed to meet some requirements necessary for the facilitation of the Check-off system. The Respondent, however, didn't explain to this Court with clarity what the requirements were and their legal foundation within the framework of the *Labour Relations Act* and or any other statute. Once a trade Union meets the statutory requirement under Section 54(1) of the *Labour Relations Act*, recruitment of 51% of an employer's workers, the employer shall not be at liberty to impose other conditionalities for recognition.
51. By reason of the foregoing premises, I find that the Claimant indeed did meet the conditions necessary for recognition, and consequentially a recognition agreement.

Whether the Respondent should effect check-off deductions from the Respondent's employees and remit them to the Claimant.

54. The Respondent asserted that it did not effect the deduction of trade union dues from the salary of the Claimant's members for remittance to the latter, inter alia on the reason that the Claimant had not obtained an Order for the deduction from the Minister. To discount this argument, the Claimant asserted that the Minister's Order, which it had earlier obtained from the Minister, and which was published in the Kenya Gazette No. 1270, of 4th February 2011, sufficed.
55. The Minister's Order read in part;

“In Exercise of the powers conferred by Section 48[1] of the *Labour Relations Act* [No. 14 of 2007], the Minister for Labour

 - (a) Revokes the Order published under Gazette Notice No. 11900 of 2010 and Orders every employer who employs not less than five [5] members of the Union of National Research and Allied Institutes of Kenya, UNRISK”
56. The question that comes up then is whether the Claimant needed a specific Order in regard to deductions flowing from the relationship between it and the Respondent. I have carefully considered the provisions of the entire of Section 48 of the *Labour Relations Act*, 2007, it insists not expressly that the Order must be specific to every relationship [employer- trade union] that a trade union enters into. Consequently, I am not persuaded by the Respondent's argument that the Claimant ought to have obtained a specific Ministerial Order.
57. Further, I have considered the contents of Order, and the manner in which it was coached, and conclude that true as the Claimant argued, the Order was sufficient to enable the Respondent commence the deductions remittances of trade union dues.



58. The Respondent has advanced an argument that although they are willing to deduct the trade union dues from their employees as aforesaid, they are unable to do so as the Claimant is required to obtain a check-off code for use on the Government Pay-Check System, which code, it hasn't. Again, the Respondent is not clear on the statute or regulation that makes it a requirement for a trade union to secure a check-off code before any deductions and remittances by the employer are done. I must say with great respect that the argument is vague and ambiguous. One through which the Respondent has failed to convince this Court that it had a reason not to deduct the dues and remit as per law required.
59. For the above reasons, I hereby allow the Claimant's claim contained in its Statement of Claim dated 5th September 2017 and declare and order as follows: -
- a. That the Respondent did unlawfully refuse to effect deduction of the Claimant's check-off dues.
 - b. That with 76% membership out of seventy-five (75) employees, the Claimant is qualified to be accorded Recognition by the Respondent.
 - c. That the Respondent effects instant deduction of the Claimant's check-off dues.
 - d. That the Respondent does sign a Recognition Agreement with the Claimant within thirty (30) days from the date of judgment.
 - e. That costs of the suit be paid by the Respondent.

READ, SIGNED AND DELIVERED THIS 27TH DAY OF JULY, 2023.

OCHARO KEBIRA

JUDGE.

In the presence of:

Mr. Walewa for Claimant

No appearance for the Respondent

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 15th March 2020 and subsequent directions of 21st April 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

