



**Kenya Petroleum Oil Workers Union v Indo Kenya Petrol Chemicals Limited (Cause E094 of 2023) [2023] KEELRC 3469 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3469 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E094 OF 2023  
M MBARÚ, J  
DECEMBER 19, 2023**

**BETWEEN  
KENYA PETROLIUM OIL WORKERS UNION ..... CLAIMANT  
AND  
INDO KENYA PETROL CHEMICALS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a registered trade union. The respondent is a limited liability company.
2. The claimant's union allow it to recruit unionisable employees of the respondent as its member and out of 40 such employees, the claimant has recruited 38 members which is over 50 + 1 percent or the simple majority required under Section 54(1) of the *Labour Relations Act*, 2007 (the LRA) for the purpose of recognition. These threshold was achieved at at May 2023.
3. On 15 May 2023, the claimant served the respondent with signed check off forms so as to effect deductions and remittance of trade union dues but has since failed and neglected to do so. This is in violation of the law and which denies the claimant the right to negotiate a collective agreement for terms and conditions of employment.
4. The claimant served the respondent with a draft Recognition Agreement, has tried to engage the respondent in dialogue to have it signed but has declined to do so.
5. The claimant is seeking for orders that;
  - a. A declaration that the respondent's actions infringe on the claimant's member's rights to fair labour relations and fair labour practices.
  - b. Order that the respondent commence deduction and remittance of union dues from the 38 unionisable employees who have acknowledged membership with the union.

- c. Order restraining the respondent, its servants, agents and/or employees from victimising, intimidating, harassing, terminating, dismissing or disciplining on account of their union membership the unionisable employees and claimant's members.
  - d. Order directing the respondent to enter into and sign the recognition agreement in accordance with section 54 of the *Labour Relations Act*, 2007.
6. In response, the respondent's case is that it has 34 employees as the nature of its work cannot allow them to have more. The respondent is law abiding and has not violated any rights of its employees as alleged. The claimant has not served any draft recognition agreement and such matter only arose in these proceedings. There is no meeting scheduled with the claimant on the matter. Due to the nature of its business, the respondent from time to time is closed down for maintenance and repair and no check off forms have been served. The forms attached to the Memorandum of Claim contain names of employees whose contracts ended by effluxion of time and some have never been in employment. The alleged intimidation of employment is without evidence and the claims made should be dismissed with costs.
7. Both parties attended court and agreed to address the claim by way of written submissions.
8. The claimant submitted that it has recruited 38 out of the total 40 unionisable employees of the respondent which meet the threshold for recognition in terms of Section 54(1) of the LRA. Despite sending a draft recognition agreement to the respondent, there is no response which is contrary to the law which call for recognition of the claimant upon attaining a simple majority as held in *Commercial Food 7 Allied Workers v Gravity Trading Company Limited; COTU (Interested party)* [2021] eKLR and *Kudheiha Workers v Lukhokho Secondary School* [2016] eKLR and the orders sought should issue to allow the claimant commence CBA negotiations with the respondent for terms and conditions of its members.
9. In response, the respondent submitted that it has not refused to recognise the claimant as alleged. There is no draft recognition agreement or check off forms served to warrant recognition or the orders sought herein. The check off forms filed by the clamant to support its case has 13 persons who have previously worked for the respondent based on their term contracts. Only Haron Onyoni has a pending contract. Others have no existing employment with the respondent including;
  - a. Emmanuel Maghan contract expired on 7 August 2023;
  - b. Katana Raphael contract expired on 7 August 2023;
  - c. Brian Saekwo contract expired on 7 August 2023;
  - d. Ali Mangwana contract expired on 7 August 2023;
  - e. Nzaka Munga contract expired on 7 August 2023;
  - f. Munga Lwambi contract expired on 1<sup>st</sup> May 2023;
  - g. Hassan John Mutua contract expired on 6 August 2023;
  - h. Silas Kiplangat contract expired on 28 August 2023;
  - i. Elphas Shamia contract expired on 12 August 2023;
  - j. Sammy Gaya contract expired on 29 August 2023;
  - k. Samuel Ndegwa contract expired on 7 August 2023;

- l. Emmanuel Tsuma contract expired on 7 August 2023.
10. The claimant filed this claim on 21<sup>st</sup> August 2023 by which time only 3 of the listed employees were in employment. The criteria for recognition was not achieved.
11. The respondent submitted that under Section 48(2) of the LRA the claimant has not obtained any Order from the Minister for the deduction and remittances of trade union dues and without a simple majority, and compliance with the law, the orders sought should not issue.
12. The respondent filed the Replying Affidavit of Pandya Shubham Nileshkumar and attached term contracts of Elphas Shamia which expired on 12 August 2023; Silas Kiplangat contract expired on 6 August 2023; Hassan Mutua contract expired on 6 August 2023 just to demonstrate some of the alleged employees in the schedule of check off forms are no longer in employment.

### **Determination**

13. Indeed, recognition of a trade union by an employer is regulated under Section 54(1) of the LRA. The subject trade union must meet the threshold under the law by securing a simple majority of all unionisable employees at the shop floor.
14. In this case, the claimant's case is that the respondent has a total of 40 unionisable employees while the respondent's case is that it has 34 employees and out of who, some were on term contracts which have since expired. The respondent filed a list of 12 employees whose contracts have since expired.
15. The claimant did not file any response to challenge the response especially with regard to the number of unionisable employee available at the shop floor in terms of its claim pursuant to Section 54(1) of the LRA.
16. The respondent as the employer is the custodian of work records in terms of Section 10(6) and (7) of the *Employment Act*, 2007. Upon the claim by the claimant, the respondent is required to file these work records.
17. Based on the response, out of the 34 employees of the respondent, 12 listed as having term contracts which have since expired, the claimant is left with 22 members in the service of the respondent.
18. The claimant filed two lists of check off forms. All these are signed by the listed persons on 13 May 2023.
19. The claim herein was filed on 23 August 2023. On the work records filed by the respondent, the shop floor has since changed. It became imperative for the claimant to return and secure sufficient numbers so as to enjoy a simple majority.
20. The threshold for recognition is contested and based on the work records, the claimant has not achieved a simple majority.
21. In the interim, the court brings to the attention of the claimant the provisions of Section 52 of the LRA;
  52. Direct payment of trade union dues  
Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by *the constitution* of the trade union directly to the trade union.

22. On the claims made, without the claimant achieving the threshold under Section 54(1) of the Labour Relation Act, 2007 as at 23 August 2023; the claim herein is without merit and is hereby dismissed. Each party to bear on costs.

Orders accordingly.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....