



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 24 OF 2019

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT

VERSUS

PETRO OIL [K] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

Judith Owi, Organizing Secretary for the Claimant Union

Oloo & Chatur Advocates for the Respondent

JUDGMENT

1. In Industrial Court at Mombasa, Cause Number 291 of 2013 [originally Industrial Court at Nairobi, Cause Number 424 of 2011], between the Parties herein, the Claimant Union presented a Claim against the Respondent, for Recognition, Deduction and Remittance of Trade Union Dues.

2. In its Judgment of 1st November 2013, the Court rejected the Claim, finding that the Claimant moved to Court before the time allowed to the Respondent to effect deduction of union dues expired. At paragraph 21 of the Judgment, the Court also concluded that the Union had at the time, recruited more than a simple majority of Respondent's Unionisable Employees. There was no order issued for recognition.

3. The Claimant continued to recruit Respondent's Unionisable Employees. On 30th April 2019, the Claimant filed this fresh Claim. It states it has now recruited 122 Employees of the Respondent, from across the Counties. It forwarded Check-Off Lists and a model copy of Recognition Agreement to the Respondent asking the Respondent to act on the forwarded documents. The Respondent did not act, necessitating the filing of the Claim, in which the Claimant replicates the prayers sought in the earlier Claim, to wit: -

- a) The Respondent is compelled to sign Recognition Agreement within 14 days, and thereafter, commence CBA negotiations within 30 days.
- b) The Respondent to deduct and remit Trade Union Dues.
- c) The Respondent is restrained from victimizing the Claimant's Members, on account of their association with the Claimant.
- d) The Respondent is barred from irregularly transferring Claimant's Members and from terminating their contracts of employment unfairly and unlawfully.
- e) Any other order.
- f) Costs.

4. The Respondent filed its Statement of Response on 18th June 2019. It concedes to have received Claimant's model Recognition Agreement and Check-Off Lists. It was not able to act on them as demanded by the Claimant. This was on the ground that the Claimant did not supply evidence of membership of Employees allegedly recruited by the Claimant, and failed to supply the Ministerial Order, authorizing Check-Off deductions. The Respondent holds that the Claimant filed the Claim prematurely, denying the Parties time in engaging at their own level. The Respondent holds as in the initial Claim, that the Claim is premature, having been filed before the Respondent could verify Check-Off Lists within 30 days, as allowed by the law. The Respondent denies it victimized any Employee.

5. The Court ordered on 25th July 2019, that the Claim is considered and determined, under Rule 21 of the E&LRC [Procedure] Rules 2016. Parties confirmed filing of their Closing Submissions at the last mention in Court on 27th September 2019.

6. The Claimant submits, which is not disputed by the Respondent, that it is a registered Trade Union, representing Unionisable Employees in the Petroleum, Oil and Gas Subsector. It is allowed by its constitution to represent Employees in Petrol and Service Stations. It has recruited 156 Unionisable Employees of the Respondent, out of a possible 269, translating into a majority of 59%. It is not denied that Check-Off Lists were forwarded to the Respondent. Section 48 [3] of the Labour Relations Act 2007, requires that the Respondent deducts and remits Trade Union Dues. There is no Ministerial Order required for deduction from an Employee's salary in form of Trade Union Dues, if the Employee has already signed Check-Off Lists. The Claimant relies on the Judgment in the previous Claim between the Parties herein. The Respondent dismissed Employees on account of their association with the Claimant. The Claimant urges the Court to allow the Claim.

7. The Respondent submits that the Claimant went quiet between 2013 when the Court rejected its Claim, and 2019 when the current Claim was filed. The Claimant tacitly acknowledged it had not met the requirements of Section 54 [1] of the Labour Relations Act. The Claimant has not adhered to Section 48 of the Labour Relations Act on deduction and remittance of Trade Union Dues, and Section 49 on Agency Fees. It has not met the requirement of Section 54.

The Court Finds:-

8. The Court does not think that once it is established that a Trade Union is the relevant Trade Union to represent a particular industry; once it is shown that the Union has recruited a simple majority of Unionisable Employees working for the Employer from whom recognition is sought; and once there is no objection made by a rival Trade Union; that recognition should be delayed or unreasonably withheld as has happened between the Parties herein.

9. Recognition is principally about numbers. It is about Section 54 (1) of the Labour Relations Act.

10. The Court found in the earlier Cause that the Claimant had satisfied the simple majority law.

11. Sections 48 and 49 of Labour Relations Act regulate deduction and remittance of Trade Union Dues and Trade Union Agency Fees respectively. They do not regulate recognition of a Trade Union. Section 49 is wholly irrelevant to the Parties, as it only applies where there is a concluded CBA, with the Employer compelled to deduct Agency Fees with regard to Unionisable Employees who are beneficiaries under the CBA, but are not Members of the negotiating Trade Union. Section 49 bars Employees from free-riding on the back of the Trade Union. It is not relevant for purposes of recognition.

12. The demand from the Respondent, asking the Claimant Union to show a Ministerial Order does not have support in the law of recognition, under Section 54 of the Labour Relations Act.

13. Deduction and remittance of Trade Union Dues are issues that can be severed from the demand for recognition.

14. Evidence of recruited numbers, is not exclusively captured in Form S. The Form is just one way an Employee acknowledges membership to the Trade Union, and thereby, consents to deduction. For purposes of showing recruited numbers, the Union can marshal other evidence outside Form S, such as membership cards, receipts of subscription fees, or affidavits sworn by Members informing the Employer about membership. Section 52 of the Labour Relations Act allows Trade Union Members to pay Trade Union Dues directly to the Trade Union. Membership, and specific numbers of recruited Members, cannot therefore rest solely, on the contents Form S.

15. If the Ministerial Order was critical to recognition, the Court in the earlier Judgment, at paragraph 15, found that the Check-Off Lists referred to Ministerial Order issued in Gazette Notice No. 745 of 2nd February 1998. In the latter recruitment, reference was made to an order made with effect from 17th June 2013. If the presence or absence of a Ministerial Order, affects recognition, Section 54 of the Labour Relations Act would have said so.

16. The Court is of the view that the Ministerial Order could only have effect with regard to deduction and remittance of Trade Union Dues, not on recognition.

17. The Claimant has however, with regard to its prayer for Trade Union Dues, not explained why it has not been able to avail the actual Gazette Notice or Notices, to the Respondent. At paragraph 5 of the Affidavit sworn by Judith Owi for the Claimant, on 29th April 2019, she states that, the Claimant presented the Respondent with a Ministerial Order, identified as PO.3. Annexure PO.3 is not a Ministerial Order, but a letter from National General Secretary of the Claimant, to the Respondent, forwarding Check-Off Lists.

18. The Claimant submits it has recruited, after the earlier Judgment, 156 out of a possible 269 Unionisable Employees of the Respondent. The Respondent has not given alternative numbers. In the view of the Court the Claimant has, once again, showed it has recruited in excess of a simple majority, satisfying the requirement of Section 54 of the Labour Relations Act.

19. The Respondent submits impliedly that the Claim is *res judicata*. This is shown at paragraph 12 of Respondent's Submissions, where it is

stated that the Parties to both Causes are the same; the issues are identical; and the earlier decision was not appealed against. The Court does not think the matter is *res judicata*. The current Claim is based on recruitment exercise that took place after the earlier Cause was dismissed. Recruitment is a continuous process and disputes on recognition are likely to recur. The numbers are not static and labour is dynamic, with Employees moving in and out of various workplaces. *Res judicata* would apply perhaps, if the Parties had come back to Court, based on the same numbers which obtained in 2013.

20. The Court has not seen evidence of victimization of Employees on account of their association with the Claimant. The documents on record show that Employees were taken through disciplinary proceedings, which are not indicated to have been related to recognition dispute. The Court does not think that an Employer should be deprived of its managerial prerogative of disciplining its Employees, simply because there is a recognition dispute between the Employer and the Union claiming to represent such Employees. If there is an Employee who has been dismissed or transferred on account of his/her association with the Claimant, it is open to the Employee to institute an appropriate individual Claim before the Court. Allegations of victimization would be considered by the Court on their merit. A blanket order barring the Respondent from terminating contracts of its Employees, would result in undue interference by the Court, with Respondent's managerial prerogative.

IT IS ORDERED:-

- a) The Respondent shall sign Recognition Agreement with the Claimant Union, within 30 days of this Judgment.***
- b) Parties shall commence and conclude CBA negotiations, sign and register their first CBA, within 70 days of executing Recognition Agreement.***
- c) The Claimant Union shall serve the Respondent with a clear Ministerial Order contained in a Gazette Notice, issued under Section 48 [2] of the Labour Relations Act.***
- d) Once received, the Respondent shall deduct and remit Trade Union Dues, with effect from the date of receipt.***
- e) No order on the costs.***

Dated and delivered at Mombasa this 13th day of December 2019.

James Rika

Judge