

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI

PETITION NO. E156 OF 2025

**IN THE MATTER OF ARTICLES 2(4), 19, 20, 22, 23, 27, 36, 41,
47, 50, 162 AND 258 OF THE CONSTITUTION OF KENYA**

2010;

AND

**IN THE MATTER OF SECTION 49 OF THE LABOUR
RELATIONS ACT;**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 174 OF 2021
(KENYA AIRLINE PILOTS ASSOCIATION – DEDUCTION
OF AGENCY FEES ORDER 2021);**

AND

**IN THE MATTER OF BREACH AND THREATENED
CONTINUED BREACH OF THE BILL OF RIGHTS UNDER
ARTICLE 27, 36, 41, 47, 50 OF THE CONSTITUTION OF
KENYA 2010**

BETWEEN

JOHN BOSCO MATHEKA..... PETITIONER

- VERSUS -

KENYA AIRWAYS PLC..... 1ST RESPONDENT

KENYA AIRLINE PILOTS

ASSOCIATION..... 2ND RESPONDENT

*(Before Hon. Justice Byram Ongaya on Wednesday 17th December,
2025)*

JUDGMENT

1. The petitioner filed the petition and supporting affidavit dated 13.08.2025 through Achola Odhiambo & Company Advocates.

He prayed for judgment against the respondents for:

(a) A declaration that the petitioner's freedom of association guaranteed under Article 36 of the Constitution of Kenya has been contravened.

(b) A declaration that the deduction or threatened deduction of agency fees from a former union member who was expelled is unlawful and unconstitutional.

- (c) A declaration that deduction or threatened deduction of agency fees from the petitioner's salary is unlawful and unconstitutional.
- (d) A declaration that Legal Notice No. 174 of 2021 cannot override the Constitution of Kenya and cannot be applied to violate fundamental rights and freedoms.
- (e) A declaration that Section 49 of the Labour Relations Act is unconstitutional to the extent that it allows expelled members to be deducted union dues.
- (f) A declaration that the Recognition Agreement between the 1st and 2nd respondent is unconstitutional and unlawful.
- (g) A declaration that the petitioner's right to fair labour practices, fair administrative action, and fair hearing guaranteed under Articles 41, 47 and 50 of the Constitution of Kenya have been contravened.
- (h) A declaration that the decision of the 2nd respondent's Executive Council made on the 6th of February 2023 was illegal, unconstitutional, unreasonable and therefore null and void to the extent that the same purported to remove the

petitioner from office and membership without according him a fair hearing.

- (i) An order of *mandamus* compelling the 2nd respondent to constitute an independent disciplinary committee separate from the Executive Council.
- (j) A declaration that the petitioner is entitled to enjoy terms equal to or better than those provided for under any Collective Bargaining Agreement without being forced to pay agency fees.
- (k) An order of permanent injunction barring the 1st respondent from deducting and remitting agency fees from the petitioner's salary to the 2nd respondent.
- (l) An order of permanent injunction barring the 2nd respondent from in any way interfering with the employment of the petitioner.
- (m) General damages to be determined by this Honourable Court.
- (n) Costs of this petition.

(o) Any other relief deemed fit to grant by this Honorable Court.

2. The petitioner's case was as follows:

- a. He is an employee of the 1st respondent and a former member and executive official of the 2nd respondent. He served as Treasurer of the 2nd respondent until on or about 06.12.2021, when he was illegally and unlawfully removed from office. He successfully contested the said illegal removal from office *vide ELRC Constitutional Petition No. E015 of 2022 – John Bosco Matheka vs. Murithi Nyaga and Kenya Airline Pilots' Association*, and was reinstated to office via Judgment delivered on 27.10.2022.
- b. Despite the aforementioned Judgment finding that several of his constitutional rights had been breached and reinstating him to office alongside several other remedial orders, the 2nd respondent defiantly refused to reinstate him to office. Not only did the 2nd respondent remove him from office again, but also expelled him from membership of the 2nd respondent on

06.02.2023, without due process, notice or an opportunity to be heard fairly, in contempt of Court orders.

- c. He is still challenging the 2nd respondent in the Court of Appeal *vide COACA No. E166 of 2024 – John Bosco Matheka vs. Kenya Airline Pilots Association & 2 Others*, appealing a Ruling by Justice Mathews Nduma Nderi for failing to find the 2nd respondent in contempt of his Orders made in the Judgment delivered on 27.10.2022.
- d. The 1st respondent has since given in to the demands of the 2nd respondent to deduct agency fees from the petitioner's salary. This is despite officials of the 2nd respondent making false and defamatory statements and allegations against him in a bid to undermine his promotional and career prospects. This petition is necessitated by the respondents' actions herein, as they seek to deduct agency fees from him despite the above circumstances.
- e. He derives no benefits from the union and/or the CBA as a non-member, has not consented to the deductions, which he views as punitive, illegal, unlawful and degrading. He is

limited to his terms of employment with the 1st respondent and any other applicable law and/or internal mechanisms of the 1st respondent to air out his grievances, touching on various issues, including pay review process, off days, sick leave, and training, as the 1st respondent is free to engage the services of non-union members to provide similar services. The petitioner has also never resigned from membership of the 2nd respondent, but was instead removed by officials of the 2nd respondent.

- f. Section 49 of the Labour Relations Act (LRA) allows deduction of agency fees from the wages of each unionisable employee covered by the CBA, and the same is also applicable to an employee who resigns from the union.
- g. He challenges the constitutionality, validity and applicability of Section 49 of the LRA and the said Legal Notice No. 174 of 2021 for reasons including that the Legal Notice No. 174 of 2021 does not benefit the unionisable, non-member employees, such as himself, and he does not stand to gain from the said CBA between the 1st and 2nd respondents. That

Section 49 of the LRA is discriminatory because it imposes deductions on non-members of unions, even on those who have been removed forcefully, compared to those who have resigned voluntarily.

- h. There is a pending Senate Bill, namely the Labour Relations (Amendment) (No. 3) Bill 2024, published on 04.10.2024, which seeks to prohibit the deduction of agency fees from the wages of a unionisable employee that is not a member of a trade union but is covered by the trade union's collective agreement.
- i. He is not enjoying CBA privileges, as the said privileges are already covered in the Kenya Civil Aviation Regulations and the Employment Act 2007, to which the 1st respondent is bound to ensure that the employment terms offered abide, and are not specific to any CBA. He should similarly enjoy employment terms such as those of Jambo Jet (a subsidiary of the 1st respondent) pilots, who are not subject to the K.A.L.P.A CBA terms and as such do not contribute union

dues or agency fees and enjoy separate employment terms independent of any CBA.

j. The 2nd respondent is abusing the Recognition Agreement between itself and the 1st respondent, which should also be declared unconstitutional and unlawful for giving it unbridled power to arm-twist and coerce the 1st respondent into issues that gravely affect non-members.

k. In the interests of justice, the 2nd respondent should be compelled to constitute an independent disciplinary committee away from the executive council, who in this case were the accusers of the petitioner and also the complainant, jury, judge and executioner. This was an anomaly that offends the principles of fair administration of justice.

3. The petitioner particularised the violation of the Constitution of Kenya as follows:

(i) The petitioner is being forced to make financial contributions in the form of deduction and remission of agency fees to the 2nd respondent as per Legal Notice No. 174 of 2021, in violation of Article 36(2) on a person not being compelled to

join an association of any kind. By compelling financial contributions through agency fees after expulsion, the petitioner is being forced into constructive union membership against his will.

- (ii) In violation of Article 41 on the right to fair labour practices, the petitioner is being denied fair labour protections by being excluded from union benefits and simultaneously punished through deductions. This is inconsistent with equal treatment in employment.
- (iii) The petitioner was expelled without a fair hearing, notice, or due process in breach of Article 47. The 1st respondent's decision to implement agency fee deductions based on this flawed expulsion compounds the breach. During the petitioner's second expulsion, orchestrated by the 2nd respondent, officials of the 2nd respondent already had a personal vendetta against the petitioner, with their decision being in contempt of Court and failing to reinstate him to his office.

- (iv) The petitioner's expulsion from the union was procedurally defective and violated his right to be heard, represented and defended under Article 50 on the right to a fair hearing.
4. The 1st respondent filed a replying affidavit, sworn by Habil Waswani on 22.10.2025, through Mohammed Muigai LLP. They urged as follows:
- a) The 1st and 2nd respondents have maintained a long-standing industrial relationship. The 2nd respondent informed the 1st respondent that the petitioner had been expelled from the union's membership. The 2nd respondent further requested that the monthly union dues previously deducted from the petitioner's salary be converted to agency fees in accordance with Legal Notice No. 174 of 2021, which applies to all unionisable pilots that benefit from the terms of the existing CBA. The 1st respondent thus engaged the 2nd respondent to implement the directive in accordance with Section 49 of the LRA and Legal Notice No. 174 of 2021.
- b) The 1st respondent does not determine whether an employee is subject to deductions for union dues or agency fees, which

information is merely communicated to it by the recognized trade union or the Ministry of Labour. The 1st respondent simply implements those directives.

- c) By an order dated 04.11.2024 issued in *ELRC Petition E168 of 2024 – John Bosco Matheka & others vs. Kenya Airways PLC & others*, the Court directed the 1st respondent to suspend deductions of agency dues pending the determination of the petition. The 1st respondent duly complied with the Order and the matter was subsequently concluded by a Judgment delivered on 07.03.2025.
- d) Following delivery of the said Judgment, on or about 28.07.2025, the 2nd respondent reached out to the 1st respondent, requesting the resumption of agency fee deductions in accordance with Legal Notice No. 174 of 2021. The 1st respondent acknowledged receipt of the said request by a letter dated 29.07.2025. Subsequently, by a memorandum dated 31.07.2025, the 1st respondent informed the petitioner of the 2nd respondent's request and intention to resume

- deductions upon confirmation of compliance with applicable legal and regulatory requirements.
- e) The 1st respondent has, at all material times, implemented deductions or suspensions of agency fees in respect of the petitioner in line with the directions issued by the relevant authorities or by the Court. The 2nd respondent has not provided any documentary evidence to substantiate the allegation that agency dues have accrued since the suspension on 06.02.2023. The schedule provided appears to have been prepared specifically for these proceedings and contains inaccuracies.
- f) Any dispute between the petitioner and the 2nd respondent concerning his membership status, expulsion or entitlement to union benefits properly lies between those parties. The 1st respondent is not privy to, or involved in, the internal governance or disciplinary affairs of the 2nd respondent and the petitioner.
- g) Contrary to the 2nd respondent's assertion, this Honourable Court did not make a substantive determination on the issue of

the constitutionality of Section 49 of the LRA and Legal Notice No. 174 of 2021 in *ELRC Petition No. E168 of 2024* (supra). The issue remains open for substantive determination in this matter.

5. The 2nd respondent filed its replying affidavit, sworn by Captain Murithi Nyagah on 26.09.2025, through Muma & Kanjama Advocates. They urged as follows:

a) Notably, the CS Ministry of Labour and Social Protection published in the gazette Legal Notice No. 174 of 2021 dated 13.08.2021 in accordance with Section 49(1) of the LRA. The notice provides inter alia that the 1st respondent shall deduct every month, 1% of an employee's basic salary who is unionisable and not a member of the 2nd respondent but benefitting from the CBA.

b) Upon the delivery of Judgment in *ELRC Petition E015 of 2022* (supra), the 2nd respondent reinstated the petitioner as an official. The 2nd respondent thereafter removed the petitioner as an official and member in accordance with its constitution.

- c) The petitioner is irregularly reintroducing the issue of contempt of orders, which was heard and determined in the said *ELRC Petition E015 of 2022*, and pending appeal in *Civil Appeal No. E166 of 2024*. This Honourable Court therefore lacks the jurisdiction to entertain this issue.
- d) The petitioner's challenge of the constitutionality of Section 49 of the LRA and Legal Notice No. 174 of 2021 is also *res judicata*, as the Judgement in *ELRC Petition E168 of 2024* found that nothing unconstitutional had been established to show that the deduction and remittance of agency fees was unlawful or unconstitutional.
- e) Further, the petitioner has not set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed. He has neither demonstrated any violation of the said constitutional provisions nor shown how the 2nd respondent has interfered with his employment with the 1st respondent.

6. The 2nd respondent also filed a notice of preliminary objection dated 26.09.2025 on the grounds that the petition raises issues that have been heard and determined in *ELRC Petition E168 of 2024* (supra) and is therefore *res judicata* as provided under Section 7 of the Civil Procedure Act. The issues herein are further pending hearing and determination in *Civil Appeal No. E166 of 2024* and hence *sub judice* under Section 6 of the Civil Procedure Act. The petitioner is inviting this Court to review and sit on appeal against the decisions delivered by competent Courts, which is unprocedural because this Court lacks supervisory jurisdiction over other Courts of concurrent and parallel jurisdiction.
7. The petitioner opposed the preliminary objection in his replying affidavit, sworn on 24.11.2025. He denied that the issues raised in the petition have already been heard and determined in *ELRC Petition E015 of 2022* and *ELRC Petition E168 of 2024*. He argued that the instant petition seeks to mainly challenge the constitutionality of Legal Notice No. 174 of 2021 and Section 49 of the LRA, among other contestations. In any event, *res judicata*

cannot bar justice in cases of continued violation of his constitutional rights. He sought that the preliminary objection be dismissed with costs to the petitioner.

8. The parties filed their respective written submissions. The Court has considered the material on record and the parties' respective submissions and returns as follows.

9. The **1st issue** for determination is whether the petition is *res judicata*.

10. The petitioner's cause of action herein is that despite judgment in *E015 of 2022 – John Bosco Matheka vs. Murithi Nyaga and Kenya Airline Pilots' Association*, finding that several of his constitutional rights had been breached and reinstating him to office alongside several other remedial orders, the 2nd respondent defiantly refused to reinstate him to office. Not only did the 2nd respondent remove him from office again, but also expelled him from membership of the 2nd respondent on 06.02.2023, without due process, notice or an opportunity to be heard fairly, in contempt of Court orders. Further, he is challenging the 2nd respondent in the Court of Appeal *vide*

COACA No. E166 of 2024 – John Bosco Matheka vs. Kenya Airline Pilots Association & 2 Others, appealing a Ruling by Justice Mathews Nduma Nderi for failing to find the 2nd respondent in contempt of his Orders made in the Judgment delivered on 27.10.2022.

11. The other material fact on record is that the petitioner filed *John Bosco Matheka & 3 others v John Bosco Matheka vs. Kenya Airline Pilots Association & 2 Others ELRC Petition No.E168 of 2024* seeking to declare his removal as a member and official of Kenya Airline Pilots Association was unlawful and unconstitutional. The petition was dismissed on 07.03.2025 and the petitioner filed a notice of appeal.
12. The Court has carefully considered the instant petition and finds that it is res judicata because the issues raised were considered or ought to have been considered in the previous two petitions and which were heard and determined on merits per the decisions on record. Further, the instant petition appears to be as well trapped by the principle of sub judice in view of the appeal pending before the Court of Appeal between the parties. It appears that the

issue of unconstitutionality of section 49 of the Labour Relations Court was found not pleaded in the said earlier *Petition No.E168 of 2024* because it had not been pleaded. By that finding, it is that it was an issue that ought to have been pleaded but was not so pleaded. By reason of the doctrine of *res judicata*, the Court finds that matters that ought to have been litigated between the same parties but were not pleaded cannot be reopened in a fresh suit as purportedly done in the instant petition. Further, the impugned section 49 of the Act being raised in the instant petition was found to be in place and the deduction of agency fees from the petitioner had not been shown to be unconstitutional or unlawful. There is no dispute that a bill is pending before the Senate seeking to amend the said section 49 but for the time being and as litigated between the parties and determined by the Court in the earlier petition, the parties are bound accordingly subject to appeal process. The submissions for the 2nd respondent in that respect are hereby upheld and the Court cannot delve into the merits of the purported cause of action which was substantially

the same cause of action in the earlier decided cases between the same parties.

13. While making that finding, the Court upholds the 2nd respondent's submissions and case that the issues about expulsion, collective agreement between the respondents and recognition agreement and their lawfulness or constitutionality were heard as ventilated in the earlier petitions and final decisions by the Court made. The Court considers that the petitioner is entitled to ventilate any dissatisfaction with the Court's findings through the preferred appeals and not this fresh petition which if entertained will amount to the Court sitting on appeal against its own earlier decisions in the same earlier cause of action and between the same parties.

14. Thus the Court finds that section 6 and 7 of the Civil Procedure Act bar the instant petition as being *sub judice* and *res judicata* respectively.

15. It is submitted for the petitioner that the current petition seeks to specifically challenge Legal Notice No. 174 of 2021 and section 49 of the Labour Relations Act about deduction of agency fees.

However, the Court finds that those are matters that he ought to have litigated, if he did not, in the earlier petitions. It is that if parties are allowed to litigate by instalment of the sub sets of an accrued cause of action after a final decision, then there would be no finality to litigation. That is the very reason why the principle of res judicata exists, namely, that as between parties, all issues in and surrounding the dispute be litigated once and for all.

16. As already found, in the circumstances, the Court will not delve into the purported merits of the dispute in the current petition.

17. The Court has considered the continuing employment relationship and the history of the dispute including the pending appeals and returns that there will be no orders on costs.

In conclusion the preliminary objection is hereby upheld and the petition dismissed with no orders on costs.

**Signed, dated and delivered by video-link and in court at Nairobi
this Wednesday 17th December, 2025.**

BYRAM ONGAYA, PRINCIPAL JUDGE