Matheka & 3 others v Kenya Airline Pilots Association & 2 others; Ministry of Labour and Social Protection & 3 others (Interested Parties) (Constitutional Petition E168 of 2024) [2025] KEELRC 721 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 721 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION E168 OF 2024

B ONGAYA, J

MARCH 7, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF

ARTICLES 1(1), 2(1), 3(1), 10, 19,20,22(1), 22(2), 23(1), 27(1),

27(2),36,41,258 & 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 4(1), 5(2), 22, 54(2), 54(3), 54(5),

57, 59, 60 OF THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF THE EMPLOYMENT ACT NO. 20 OF

2011

AND

IN THE MATTER OF THE RESTRICTIVE AND

MONOPOLISTIC RECOGNITION AGREEMENT AND THE

LIMITING COLLECTIVE BARGAINING AGREEMENT

BETWEEN

JOHN BOSCO MATHEKA ..... 1ST PETITIONER

ISSA ELANYI CHAMAO ..... 2ND PETITIONER

PATRICK KARANI EKIRAPA ..... 3RD PETITIONER

PAUL NGWEYWO KIRUI ..... 4TH PETITIONER

AND

KENYA AIRLINE PILOTS ASSOCIATION ..... 1ST RESPONDENT

KENYA AIRWAYS PLC ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

MINISTRY OF LABOUR AND SOCIAL PROTECTION .. INTERESTED PARTY

MINISTRY FOR ROADS & TRANSPORT ..... INTERESTED PARTY

KENYA AVIATION WORKERS UNION ..... INTERESTED PARTY

COMPETITION AUTHORITY OF KENYA ..... INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition dated 16.10.2024 through Manyonge Wanyama & Associates LLP. The petitioner prayed for:

    a. A declaration that the decision of the association of 23.02.2024 to expel the 1st petitioner from its membership without any colour of right or cogent reasons violates the 1st petitioner's right to fair administrative action that is protected by Article 47(1) of the *Constitution*.

    b. A declaration that:

        i. the attempt by the association to interfere with the 1st petitioner's employment relationship with Kenya Airways; and,

        ii. its action of requiring that Kenya Airways deducts agency fees from the 1st petitioner's salary and remits it to the association yet it has expelled him from the membership contravene the 1st petitioner's right to fair labour practice that is protected by article 41(1) of the *Constitution*.

    c. A declaration that it amounts to an unfair labour practice and a contravention of Article 41(1) of the *Constitution* for:

        i. Kenya Airline Pilots Association to require that Kenya Airways Limited cannot recruit a pilot on contract or permanent and pensionable terms without the approval of the Association.

        ii. Pilots who are employed by Kenya Airways are compelled to be members of the Kenya Airline Pilots Association.

        iii. Kenya Airline Pilots Association to control the training and promotion of pilots.

        iv. Kenya Airline Pilots Association to give directives on flight operations to pilots without difference to Kenya Airways, the employer

        v. Kenya Airline Pilots Association to create an environment for a differential treatment of pilots at the workplace.

        vi. Kenya Airline Pilots Association to control all activities of pilots at the workplace.

vii. Kenya Airline Pilots Association to refuse to negotiate a collective bargaining agreement that complies with the *Constitution*, regulatory developments in the aviation sector and productivity concerns of the employer.

viii. Kenya Airline Pilots Association to use threats of industrial action and to control flight operations.

d. A declaration that it is a violation of Article 41(2) (c) of the *Constitution* for Kenya Airline Pilots Association to create an operational environment where a pilot employed by Kenya Airways must be a member of the Association and cannot join any other trade union.

e. A declaration that with the intendment of Article 41(2) (c) of the *Constitution*, the petitioner as well as other pilots employed by Kenya Airways can join, form and join a trade union of their choice.

f. A declaration that clause 3(a) of the 1979 recognition agreement between Kenya Airways Plc and Kenya Airline Pilots Association which states that the Association shall represent all pilots, flight engineers and flight navigators violates Article 41(2)(c) of the *Constitution* – to the extent that it shuts out the right of employees to join another trade union.

g. A declaration that it is lawful and within the intendment of Article 41(2) (c) of the *Constitution* for the petitioner to mobilize other pilots to register another trade union.

h. A declaration that the right of the employee to engage in collective bargaining in Article 41(5) of the *Constitution* may entail the employer insisting on terms and conditions at the workplace that do not perpetuate inequality amongst its workers.

i. A declaration that the right of the employer to engage in collective bargaining in Article 41(5) of the *Constitution* permits the employer to require that terms and conditions at the workplace should be based on productivity of its workers.

j. A declaration that clause 19(d) of the 2017 collective bargaining agreement between the Kenya Airways and Kenya Airlines Pilots Association that allows pilots to be absent from duty for a period of 48 hours on sick leave without being required to produce a certificate signed by a registered medical practitioner, practise that is often abused and is the single most contributor of the costly flight disruptions at Kenya Airways and is not available to other employees of Kenya Airways PLC contravenes Article 27(1) of the *Constitution*.

k. A declaration that clause 19(d) of the 2017 collective bargaining agreement between Kenya Airways and Kenya Airlines Pilot Association that allows pilots to be absent from duty for a period of 48 hours on sick leave without being required to produce a certificate signed by a registered medical practitioner, practice that is often abused and is the single most contributor of the costly flight disruptions at Kenya airways and is not available to other employees of Kenya Airways Plc contravenes Article 41(1) of the *Constitution*.

l. A permanent Injunction be and is hereby issued stopping Kenya Airline Pilots Association from:

a. Seeking to control the recruitment training, discipline and promotion of pilots by Kenya Airways Plc.

b. Requiring that all pilots who are employed by Kenya Airways be members of the Kenya Airline Pilots Association.

c. Giving directives on flight operations to pilots without difference to Kenya Airways, the employer.

d. Creating an environment that supports differential treatment of pilots at the workplace.

e. Controlling all workplace activities of pilots who are employed by Kenya Airways plc

f. Using threats of industrial action to cripple Kenya Airways flight operations.

m. An order be issued prohibiting Kenya Airways from deducting agency fees from the 1st petitioner's salary on behalf of Kenya Airline Pilots Association.

n. An order be issued compelling Kenya Airline Pilots Association to refund all agency fees it had received from Kenya Airways from the 1st petitioner's salary since 23.02.2024 to date.

o. An order be issued compelling the Kenya Airline Pilot Association to pay the 1st petitioner damages in the sum of Kshs 10,000,000/- for violation of the 1st petitioner's right to fair administrative action.

p. An order directing the Chief Executive Officer of Kenya Airways Plc to take the necessary steps to align its labour and employment practices to the constitutional requirements of Article 27(1) and 41(1) of the *Constitution*.

q. An order be issued directing the Chief Executive Officer of Kenya Airways plc and Kenya Airline Pilots Association to negotiate and sign a collective bargaining agreement that is aligned to the constitutional requirements of Article 27(1) and 41(1) of the *Constitution*.

r. A permanent injunction be issued directing Kenya Airline Pilots Association not to interfere with the employment relationship between the 1st petitioner and Kenya Airways in any manner whatsoever.

s. Costs of petition be borne by the Kenya Airline Pilots Association.

2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioner's case is as follows:

a. He is employed by Kenya Airways as a pilot (first officer).

b. The petitioner stated that, whilst Kenya Airways is seeking to remain on the path of profitability, there are systemic challenges that hamper the growth; the dominant one being the relationship between Kenya Airways and the Kenya Airline Pilots Association that affects productivity.

c. The petitioner was a member of the Association and served as its treasurer but was expelled for raising concerns about the underlying productivity issues.

d. The problematic relationship between the Kenya Airways, the Association and Pilots, he stated, is characterized by the following components:

i. Despite being the employer, Kenya Airways cannot recruit a pilot on contract or permanent and pensionable terms without approval of the Association.

ii. Pilots who are employed by Kenya Airways are compelled to be members of the Association without exception.

iii. The Association and not Kenya Airways, as the employer, controls the training of pilots.

iv. Pilots who are employed by Kenya Airways often received operational directives from the Association and not from Kenya Airways; in essence they are paid by Kenya Airways to fly its planes but are accountable to the Association on flight operations. The petitioner stated that there are many instances where a flight has been scheduled but the Association directs the pilot not to take the flight. Often this leads to flight delays and massive operational challenges. Based on global regulatory requirements. Kenya Airways is often compelled to bear the cost of flight delays despite not having caused the problem.

v. The Association has allowed situations where a pilot can be absent from duty for a period of 48 hour on sick leave without being required to produce a certificate signed by a registered medical practitioner. This practice is the single most contributor of the flight disruptions at Kenya Airways.

vi. A pilot at Kenya Airways earns Kshs 1.5 million per month; but because of directives from the Association such a pilot gets to fly only 40 hours per month. The global regulatory benchmark is 80-100 hours per month.

vii. The members of the Executive Council of the Association are employees of Kenya Airways. In this capacity they control the activities of pilots and sabotage the employer. Often the Association makes unreasonable demands to Kenya Airways and threatens withdrawal of services by its members, if the demands are not met.

e. The petitioner cannot form or join another union, largely because of threat of victimization, expulsion and blackmail from the Associations' leadership.

f. The Association does not act in good faith and in the interests of its members. In 2019 the Association pushed for work protests and in 2022 it pushed for unlawful industrial action and disobeyed court orders to call off the strike, resulting in its members being found to be in contempt of court.

g. The Association has frustrated the initiative by the pilots to negotiate and replace the 2017 collective bargaining agreement that has since expired.

h. The petitioner and other pilots are concerned by the underlying productivity challenges that are directly traceable to the conditions imposed upon them by the Association.

i. The petitioner was expelled from the Association on 06.02.2023. He maintains that the expulsion was done unlawfully and breached his constitutional right to due process and fair administrative action.

j. After the expulsion, the Association has attempted to interfere with his employment with Kenya airways, and wants him dismissed without any cogent reason.

k. Despite his expulsion, the Association continues to demand that Kenya Airways deducts and remits agency fees from his salary.

3. The 1st respondent filed the replying affidavit of Captain Murithi Nyagah sworn on 06.02.2025, the General Secretary and Chief Executive Officer of the 1st Respondent, through Muma & Kanjama Advocates. It was stated and urged as follows:

a. The 1st respondent is a registered trade union under the *Labour Relations Act* through the Certificate of registration No. TU/120 dated 10.03.2015.

b. The 1st and 2nd respondents entered into an agreement on recognition and negotiating procedure dated 05.05.1978, wherein clause 3 of the agreement provides that the 2nd respondent shall recognize the 1st respondent as the body to represent all pilots, flight engineers and flight navigators employed by the 2nd respondent and its subsidiaries in all matters relating to terms and conditions of service.

c. The terms and conditions of service include but are not limited to rates of pay, duration of employment, hours of work, method of wage payment, paid leave, collection of association dues, medical facilities, sick leave, insurance fleet arrangement and other generally accepted terms and conditions of employment.

d. The recognition agreement provides under clause 4 procedures for negotiating individual grievances, collective claims and collective grievances. Failure to reach an agreement under the negotiation procedures, the agreement provides that disputes may be referred to the Minister of Labour in accordance with the provisions of Kenya Trade Disputes Act(now repealed by the *Labour Relations Act*).

e. Clause 5 of the recognition agreement provides that the agreement shall continue in force from 05.05.1978 until amended or rescinded by mutual agreement.

f. The 1st respondent registered with the Minister, the 1st respondent's constitution and rules dated 06.07.2015 which provides on the Association's terms and conditions of membership, monthly contributions of 1% of one's monthly basic pay and removal of officials and members.

g. The 1st and 2nd respondents negotiated and agreed on a collective bargaining agreement dated 02.08.2017 containing terms and conditions of service applicable to all employees in the service of the 2nd respondent as pilots except employees on specific contract terms.

h. The 1st interested party published in the Kenya gazette legal notice no. 174 dated 13.08.2021, the Kenya Airline Pilots Association (Deduction of Agency Fees) order, 2021, which provided that the 2nd respondent shall deduct on a monthly basis 1% of an employee's basic salary who is unionisable and is not a member of the 1st respondent but is benefitting from the CBA.

i. There is a pending Senate Bill, the Labour Relations (Amendment)(No. 3) Bill 2024 published on 04.10.2024 which seeks to prohibit deduction of agency fees from the wages of a unionisable employee who is not a member of a trade union but is covered by the trade union's collective agreement.

j. The 1st and 2nd respondents met on various dates in October, 2024 to discuss the CBA negotiations which were concluded in December, 2024 and the new CBA was signed on 19.12.2024. The new CBA was registered in court on 29.01.2025 in CBA No. E006 of 2025 under entry no. RCA No. 9 of 2025.

k. Section 54 of the *Labour Relations Act* does not limit the number of trade unions that can be formed. It addresses the recognition of trade unions by employers for purposes of collective bargaining, stipulating that an employer must recognize a trade union if it represents a simple majority of unionisable employees. It outlines the processes for recognition agreements and dispute resolution concerning recognition but does not specify any limitations on the formation of new trade unions.

l. The 1st petitioner has not demonstrated and specified the constitutional rights and provisions that section 54 allegedly violates.

m. The 1st petitioner, with the exclusion of the 2nd to 4th petitioners who are not pilots, has not demonstrated whether he attempted to form and register a union and meet the threshold of simple majority in section 54(1) of the Act for recognition of the 2nd respondent for purposes of collective bargaining.

n. The petition was filed prematurely during negotiations of the new CBA between the 1st and 2nd respondents. The new CBA was entered into in December, 2024, therefore, the petition herein which challenges the CBA 2017 has been overtaken by events and does not require this court's hearing and determination which shall be an academic exercise.

o. The 1st respondent denied the petitioner's averments that the relationship with the 2nd respondent is unconstitutional, unlawful and illegal and that it has affected the profitability and productivity of the 2nd respondent thus threatening to render the employees of the 2nd respondent jobless.

p. The 1st petitioner's issues leading to his removal were disruptive to the operations of the 1st respondent and this petition is a disguised attack against the 1st respondent and it does not raise matters seeking to positively improve the relationship between the 1st and 2nd respondents and increase the latter's productivity. The petition was filed to frustrate the new CBA negotiations, however, the petitioners were unsuccessful at it.

q. The 1st petitioner's challenge against deduction of fees under legal notice no 174 is a matter before the legislator under the Senate Bill published on 04.10.2024 hence the Honourable Court lacks jurisdiction to hear and determine issues under the purview of the legislature.

r. The public interest concerns raised by the 2nd to 4th petitioners on loss of massive taxpayers' investments in the 2nd respondent, are mere allegations without empirical evidence. Furthermore, the 2nd to 4th petitioners lack locus standi since they are not members of the 1st respondent or employed by the 2nd respondent.

s. The new CBA resolved various terms and conditions of service which were in dispute in the old CBA between the 1st and 2nd respondents

t. The following provisions have been amended in the new CBA hence rendering the petitioner's claims nugatory.

    i. The 2nd respondent does not require the 1st respondent's approval to recruit a pilot on contract or permanent and pensionable terms.

    ii. The 1st respondent denied abusing and exploiting the provision of the old CBA to negatively control member and non-members employed by the 2nd respondent thus resulting in operational and performance challenges by the 2nd respondent.

    iii. The 1st respondent does not demand that all pilots employed by the 2nd respondent must be members of the 1st respondent. The 1st respondent does not limit the pilot's freedom of association under Article 36 of the *Constitution* and Section 5(2) of the *Labour Relations Act*.

iv. That the 1st respondent does not exercise managerial control and oversight of all pilots employees without regard to employment terms and conditions between the non-members and the 2nd respondent.

u. The 1st respondent has neither created an environment for differential treatment of pilots at the workplace nor has it allowed pilots to be absent on sick leave without certification from a medical practitioner.

v. The new CBA complies with the *Constitution*, regulatory developments in the aviation sector and productivity concerns of the 2nd respondent, which the petitioners are raising in the petition. Therefore, the petition herein is rendered nugatory and its substratum has been extinguished.

w. The questions for constitutional interpretation outlined in the petition have not met the threshold for this court's exercise of constitutional determination because it has been demonstrated that:

1. The 1st respondent has not interfered with the 1st petitioner's employment with the 2nd respondent contrary to Article 41.

2. The 1st respondent's receipt of agency fees from the 1st petitioner, as a non-member, is lawful.

3. The 1st respondent's actions under the CBA (old and new) do not amount to limiting recruitment and membership, controlling training and promotion, giving directions on flight operations, giving differential treatment to pilot, allowing unconditional sick leave, controlling pilots activities, refusing to negotiate a CBA and threating industrial actions.

4. A pilot is not barred from joining another trade union other than the 1st respondent.

5. Clause 3 of the recognition agreement does not limit recognition and/or contravene articles 41(2)(c) and 41(5) and/or how CBA negotiations should be held.

6. The terms and conditions for sick leave under the CBA are in accordance with Articles 27 and 41 of the labour laws.

4. The 2nd respondent filed the Replying Affidavit and Further Affidavits of Habil Waswani, the Director of Legal Services and Regulatory Compliance of the 2nd respondent, sworn on 21.11.2024 and 13.02.2025 respectively, through Mohammed Muigai LLP. It was stated and urged as follows:

a. At the time the Act was enacted, section 54 of the *Labour Relations Act* was a lawful limitation to the freedom of association of employees and the right to form and/or join a trade union under section 80 of the repealed constitution of Kenya 1969, which gave Parliament wide latitude to impose any necessary restrictions on the freedom.

b. Since the promulgation of the *Constitution* of Kenya, 2010 several provisions of the *Labour Relations Act* no longer align with the freedom of association as enshrined under Article 36 of the *Constitution* and the right to fair labour relations as protected under Article 41.

c. This belief is informed by the fact that the Act limits the number of unions that can be formed within an organization to one, rather than any other number that the petitioner may prefer, thereby compelling employees to either join an already recognised union, a compulsion that

contravenes Article 36 (2) of the *Constitution* or to relinquish their right to exercise the freedom at all.

d. This limitation is not justifiable in a free, transparent and democratic society given that firstly, the law does not balance the right of the individual employee to determine the manner in which they exercise their freedom of association against whichever objective it seeks to attain. Secondly the law prejudices individual employees by creating an avenue of the collective to intrude in their employment relationship with the employer without their consent. Further the law allows for the deprivation of a portion of an employee's salary without according them any benefits in return as the deduction of agency fees does not ipso facto make the employee a member of the union or allow them to participate in the affairs of the union. The law was enacted prior to the promulgation of the 2010 Constitution and remains a product of its time.

e. In the most recent collective bargain agreement negotiation between the 1st and 2nd respondent, there was evident withdrawal goodwill by the 1st respondent. While the 2nd respondent's primary intention was to put in place a productivity based CBA for pilots that takes into account current legislation and the airline's economic recovery strategy, the 1st respondent was principally focussed on securing preferential treatment and entitlements for its members to the detriment of the 2nd respondent's other employees who do not belong to the union and make up more than 80% of its staff.

f. Despite the 2nd respondent's financial position which, being the national airline carrier, was drastically affected by the travel restrictions occasioned by the outbreak of COVID19.

g. The existing recognition agreement was created forty five years ago and thirty two years before the promulgation of the *Constitution* of Kenya 2010. The recognition agreement is outdated and not aligned with the current Constitutional framework.

h. The continued application of the recognition agreement places the 2nd respondent at risk of prejudice where it either would be compelled to apply provisions that violate the *Constitution* on the one hand or to deviate from the recognition agreement and suffer retaliation from the union, circumstances that would have substantial and immediate effect on the operations of the 2nd respondent.

i. The recognition agreement mandates that all pilot, flight engineers and flight navigators employed by the 2nd respondent belong to the union which in essence requires the 2nd respondent to adopt discriminatory hiring practices creating circumstances where some qualified candidates may not be hired simply because they are not a union member in contravention of the right to fair labour practices.

j. The recognition agreement which formed the basis of the 2017 CBA has created an environment where the union not the employer, manages the affairs of the pilots, flight engineers and flight navigators within the 2nd respondent's staff. This would not be an issue save for the fact that the manner that the union has engaged with these responsibilities has been highly prejudicial to the rest of the 2nd respondent's staff.

k. The 1st respondent has allowed far greater privileges and entitlements for its members and has adopted far greater laxity in enforcing disciplinary measures which are not afforded to the rest of the 2nd respondent's staff. This continues to adversely impact the employer-employee relationship between the 2nd respondent, and the employees who do not belong to the union as they are exposed to differential treatment without proper justification in line with the dictates of article 27 of the *Constitution*.

l. The privileges afforded to the members of the 1st respondent have created conditions that have created low productivity levels compared to global standards mainly attributable to past go slow directives by the 1st respondent, opposition and objection to the hiring of expatriate or contract pilots, oppositions to job evaluations and wrangles over shift changes.

m. Some of the entitlements inuring to members of the 1st respondent threaten the economic viability of the 2nd respondent to the detriment of its entire staff and thus exposing the huge public investment made in the 2nd respondent to considerable risk.

n. Under the current 2018 CBA as informed by the recognition agreement, the pilots of the union are entitled to sick leave of 2 days without presenting a medical report and without prior notice, has occasioned and continues to occasion flight delays and cancellations costing the 2nd respondent massive losses at a time when it is attempting an economic recovery strategy.

o. Clause 3(a) of the recognition agreement between the 1st and 2nd respondent is prima facie unconstitutional, null and void as it amounts to a violation of Article 36 and 41 of the *Constitution* and violates section 4 and 5(2) of the *Labour Relations Act* in the manner it provides for exclusivity of a sole union to represent pilots, flight engineers and navigator in all employment related discussions.

p. By granting exclusivity to a sole union in perpetuity, clause 3(a) indirectly amounts to compulsion of employees and unfair labour practices against the employees of the cadre represented by the 1st respondent as they are limited to membership to a sole union in violation of section 4 and 5(2) of the *Labour Relations Act*.

q. Clause 23 of the CBA provides for travel benefits extended solely to the union employee to the detriment of other employees of the 2nd respondent who undertake comparable roles and execute comparable functions that support the operation of the 2nd respondent. Such differentiated treatment on the access to various cabin class accommodation perks and related benefits are not justifiable on the basis of the role or duties undertaken by the 1st respondent members.

r. On deduction and withholding of agency fees from the 1st petitioner, the 2nd respondent is constrained by the express provisions of section 49 of the *Labour Relations Act*, and acted under a colour of law in deducting and remitting the agency fees following a demand by the 1st respondent.

s. The current recognition agreement does not align with the current constitutional dispensation. It would be in the best interest of the public that the recognition agreement is terminated or suitable restructured by a court order in a manner that will protect the 2nd respondent from any unilateral, adverse or precipitative actions of the 1st respondent who have in the past exercised disruptive options including and not limited to instigation of strikes, go slows or other industrial action to cripple the 2nd respondent if the 2nd respondent was by themselves to seek to regularize or otherwise set aside the prima facie unconstitutional provisions of the RA.

5. The 4th interested party filed the replying affidavit of Joel Amenya Omari, the Director Competition and Consumer Protection at the Competition Authority of Kenya, sworn on 27.11.2024 through the Attorney General. It was stated and urged as follows:

a. The petition is entirely a labour relations matter and therefore outside the jurisdiction and statutory mandate of the 4th interested party to be named as an interested party.

b. The petition discloses no reasonable cause of action and or any interests of the 4th interested party.

6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court has considered the material on record and returns as follows.

7. To answer the 1st issue and as submitted for the 1st and 2nd respondents, section 49 of the *Labour Relations Act*, 2007 requires the 2nd respondent to deduct and remit agency fees with respect to unionisable staff not being union members, like the 1st respondent, in accordance with the Ministerial order issued under the Act. The constitutionality of that section 49 is not an issue pleaded and falling for determination in the instant case. The Court returns that nothing unconstitutional has been established for the 1st petitioner to show that the deduction of the agency fees is unlawful or unconstitutional.

8. To answer the 2nd issue, the Court returns that no material facts and relevant evidence has been placed before the Court to show that the expulsion of the 1st petitioner as member of the 1st respondent was in violation of fair administrative action as provided for under Article 47(1) of the *Constitution*. The letter of expulsion dated 08.02.2022 shows that the expulsion was in accordance with the *Constitution* and rules of the 1st respondent of 2015 and it was not conclusive because it was pending a review or ratification during the next special or annual conference. The Court has not been informed on further steps after the impugned expulsion letter. Pertinent is the reason for expulsion stated in the letter thus, "Details that have led to your expulsion are covered in the show-cause letter issued to you on 10th January 2022 and a further letter by the General Secretary dated 21st January 2022, that you have neither acknowledged nor responded to till date." The Court finds that the letter speaks to reasons and procedure and in absence of any further material and relevant facts and evidence, the alleged violation of Article 47 of the *Constitution* is not an issue for Court's decision. In any event, the issue of expulsion appears to have been decided or ought to have been decided in ELRC Petition E015 of 2022, John BoscoMatheka –Versus-Muriithi Nyaga and Another which the 1st petitioner has submitted found that his removal as treasurer of the union was unlawful. In that regard, the issue appears to the Court to be res judicata.

9. To answer the 3rd issue, the Court has considered the lamentations by the 1st petitioner as supported by the 2nd respondent that the Recognition Agreement of 1978 creates a closed shop that the mentioned employees of the 1st respondent be members of the 1st respondent Association or trade union. It was submitted that the recognition agreement requires the union to represent all pilots, flight engineers, and flight navigators employed by the 2nd respondent to be represented by the 1st respondent union, per clause 3(a) as it shuts out the right of the employees to associate, form and join other unions as envisaged in Article 36 and 41 of the *Constitution* and violates section 4 and 5(2) of the *Labour Relations Act*. The said clause 3(a) states as follows, "(a) The Company hereby agrees to recognise the Kenya Airline Pilots Association (KALPA), as the body to represent all pilots. flight engineers and flight navigators employed by Kenya Airways Ltd, and its subsidiaries in all matters appertaining to terms and conditions of service which shall include inter alia:-rates of pay, duration of employment, hours of work, method of wage payment, paid leave, collection of Association dues, medical facilities, sick leave, insurance, fleet agreements, Kenyanisation, and other generally accepted terms and condition of employment." It was submitted that it was a monopoly for the recognition agreement to require the 2nd respondent not to recognise another union with respect to the three categories of the employees. For

the 1st respondent it was submitted that the clause does not undermine the 2nd respondent's entitlement or legal obligation to recognise any other union as may be formed by its staff provided the threshold for recognition of any such other union is attained per section 54 of the *Labour Relations Act*, 2007. The Court agrees with the submission made for the 1st respondent. It is that employees of the 1st respondent that may be unionisable are not bound by clause 3(a) of the recognition agreement and are free to associate, form and join other unions and if such other unions meet the threshold for recognition, then, the 2nd respondent would be entitled as is obligated to recognise the new union as per the said section 54 and in accordance with Article 36 and 41 of the *Constitution* and does not violate section 4 and 5(2) of the *Labour Relations Act*. In other words, the Court finds that clause 3(a) of the recognition agreement does not bar the 2nd respondent from recognising other unions which are not parties or privy to the impugned recognition agreement. The Court therefore finds that the provisions of the clause are not unconstitutional because, as appears to the Court, they are capable of being construed and implemented in consistency with the constitutional and statutory provisions as found by the Court. If in any particular instance they were to have an unconstitutional or unlawful impact in their implementation, such as denial of recognition to a newly formed union which passes the tests in section 54 of the Act, or, any of the three employees in the three categories of the clause 3(a) mentions are denied association and collective bargaining by forming and joining a new union of their choice, then such unconstitutional effect would fall for question for a finding of unlawfulness or unconstitutionality. Thus, the clause 3(a) by itself is not unconstitutional or unlawful as it is not shown to be inherently inconsistent with a constitutional rule or statutory prescription and can be constitutionally or lawfully implemented. Where its implementation in a specific situation results in unconstitutional or unlawful impact, then such impact would fall for quashing or nullification in appropriate proceedings. As submitted for the 2nd respondent the recognition agreement shall be interpreted in a manner that brings it to conformity with the prevailing constitutional, statutory, and sustainable commercial or enterprise regimes.

10. In view of the findings in the foregoing paragraph, the Court has been guided by the holding in Kenya Plantation & Agricultural Workers Union v David Benedict Omulama & 9 others [2017] KECA 543 (KLR) where the Court of Appeal stated thus:

> " The 1st to 9th respondents relied in the High Court on the decision of Rika, J. in Kenya Union of Export, Import and Allied Workers Union & Others vs. The Registrar of Trade Unions - Industrial Court Civil Appeal No. 1 of 2010 where the learned Judge said at para 14:
>
> > " Genuine persons with genuine, legitimate and useful aspirations to form trade unions must however not be limited in the exercise of the basic right of association. There is a tendency among some established trade unions to unreasonably curtail the right of association of new players for fear of competition. These trade unions do so with the aid of the government and employers with whom they have become cosy owing to their long years of familiarity. The need to check proliferation and encourage real pluralism must not be a pretext by established social partners, to frustrate the legitimate endeavors of new players. Perceived rivals need to be protected in exercise of their basic right of association from established and apprehensive players"
>
> That passage illuminates graphically the threat to freedom to form and join trade unions as enshrined in the *Constitution*.

(14) The 1st to 9th respondents in their grounds of appeal in the High Court enumerated cases where new unions have been registered in the same sector despite the existence of other registered trade unions in the same sector.

In the instant case, the Registrar merely reproduced the statutory condition for registration as the reason for refusal of registration, without, as the High Court stated, giving reasons why the appellant substantially represented the whole or a substantial portion of the interests that the proposed union intended to protect. The learned judge considered the relevant part of the *Constitution* of the appellant, the dynamic growth and diversification of the economy and in particular the horticultural and floriculture industry and formed the opinion that there was no fundamental justification why the right to form the proposed union should be limited.

The appellant is a general and giant trade union. The proposed union sought to protect the interest of workers in specialized and critical sector of the economy. We are satisfied that the learned judge gave valid reasons why registration should not have been refused."

11. The Court observes that as already found earlier in this judgment, in the cited Court of Appeal decision, the issue was whether the registration of a new union would be denied because of the pre-exiting large union claiming monopoly of recognition and therefore representation of concerned workers. It is that the "monopoly clause" in the recognition had been applied with an unlawful or unconstitutional impact, not that by itself it was inherently unlawful or unconstitutional. In the instant case, the Court has found that the dispute is not about an unlawful or unconstitutional application of the "monopoly clause" and which clause 3(a) has been found to be capable of being applied lawfully and constitutionally in appropriate situations.

12. While making the foregoing findings, the Court has further considered that there is a ready statutory path to question the impugned recognition agreement if found offensive or oppressive to either party as section 54(5) provides that an employer may apply to the National Labour Board to terminate or revoke a recognition agreement.

13. To answer the 4th issue, the Court finds that it is common ground that the collective agreement of 2017 has since been replaced or overtaken by the subsequent collective agreement registered in Court on 29.01.2025. The Court finds that the prayers as relates to the overtaken collective agreement are thereby rendered moot. In any event, it was submitted that the impugned recognition and collective agreements unfairly step into the 2nd respondent's prerogatives to perform human resource functions and powers as an employer – such as recruitment, working hours, enterprise operational requirements, disciplinary control and others. It appears to the Court that there was nothing unlawful or unconstitutional for the 1st and 2nd respondents to make agreements in such manner. It was within their respective freedom to contract to negotiate the terms of their respective agreements. It is not said that the recognition agreement walks outside the model recognition agreement as may have been published by the Cabinet Secretary per section 54 (4) of the Act. It is not also said and shown that the collective agreement has gone beyond setting the terms and conditions of unionisable employees. In any event, the Court considers that any person seeking to challenge registration of a collective agreement may do so per rule 78 of the Employment and Labour Relations Court (Procedure) Rules 2024.

14. It was submitted for the petitioner that despite the issues about the expired collective agreement of 2017 were not moot because the new CBA does not resolve the live controversy of parties' rights as was held in Institute for Social Accountability & Another –Versus- National Assembly & 3 Others and

5 others (Petition 1 of 2018) [2022]KESC 39(eKLR). However, the Court finds that the petitioners have not challenged the 1st respondent's case that the new CBA resolves the issues. Further, the issues would fall for challenging the CBA in the manner prescribed in the Acts and rules.

15. The Court further considers that the parties should be able to implement the recognition agreements and collective agreements in a non-discriminatory manner and any specific discriminatory case will fall for relief in appropriate legal proceeding. The 2nd respondent has admitted to discriminatory impact without providing particulars of the discrimination such as of actual affected employees and in which event the 2nd respondent would be in violation of Article 27 of the *Constitution* and Section 5 of the *Employment Act*.

16. In view of the findings, the Court returns that the reliefs prayed for will collapse as not established or as unjustified.

17. The Court has considered that parties are in continuing work relationships and each will bear own costs of the petition.

In conclusion the petition is hereby dismissed and each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 7TH MARCH, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE