



Forum for Good Governance and Human Rights v Public Service Commission & 4 others; Central Organisation of Trade Unions (COTU-K) & 2 others (Interested Parties) (Employment and Labour Relations Petition E058 of 2023) [2024] KEELRC 723 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 723 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E058 OF 2023
AN MWAURE, J
MARCH 20, 2024**

BETWEEN

FORUM FOR GOOD GOVERNANCE AND HUMAN RIGHTS PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

THE CABINET SECRETARY LABOUR & SOCIAL PROTECTION 2ND RESPONDENT

THE CABINET SECRETARY, PUBLIC SERVICE YOUTH AND GENDER AFFAIRS 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

THE UNION OF KENYA CIVIL SERVANTS 5TH RESPONDENT

AND

CENTRAL ORGANISATION OF TRADE UNIONS (COTU-K) INTERESTED PARTY

FEDERATION OF KENYA EMPLOYERS (FKE) INTERESTED PARTY

THE REGISTRAR OF TRADE UNIONS INTERESTED PARTY

RULING

1. The Petitioner filed a Notice of Motion dated 17th March 2023 seeking orders that:

1. spent



2. Pending the hearing and determination of this Application or / Petition and / or further orders, a Conservatory Order does issue to stop / restrain / prohibit the 1st Respondent from implementing the agency fees Order as contained in Kenya Gazette, Legal Notices No 19 dated 26/01/2022, published on the 06/02/2022 against those employment and labour officers deployed in offices established under the 2nd Respondent's Ministry.
3. Pending the hearing and determination of this Application or / Petition and / or further orders, an order be issued and is hereby issued, barring/stopping/prohibiting the 1st Respondent from effecting deductions of agency fees from all unionisable employees in the civil service, and who are not members of the 5th Respondent, who are deployed to any of the departments of the 2nd Respondent's Ministry, as per Legal Notices No 19 dated 26/01/ 2022, published in Kenya Gazette on 06/02/2022.
4. Pending the hearing and determination of this Application or Petition and / or further orders, an Order be issued and is hereby issued, barring the 3rd Respondent from directing the 1st Respondent to effect the 2nd Respondent's Agency Fee deductions Order, as contained in Legal Notices No 19 dated 26/01/ 2022, published in Kenya Gazette on 06/02/2022.
5. Pending the hearing and determination of this Application or Petition and / or further orders, an Order be issued and is hereby issued, suspending, and / or staying the implementation of the 2nd Respondent's Agency Fee deductions Order contained in Legal Notices No 19 dated 26/01/ 2022, published in Kenya Gazette on 06/02/2022.
6. The Petition be certified as one which raises weighty matters of law and the same be remitted to the Chief Justice to empanel a bench of uneven judges for the hearing and determination of the Petition
7. Finally, the costs be provided for.

Petitioner/Applicant Case

2. The Petitioner avers that vide Legal Notice No 19 dated 26/01/2022, and published in the Kenya Gazette on 6/02/2022, the 2nd Respondent has issued an Agency Fee Deduction Order directing the 3rd Respondent to deduct 1.5% Agency Fee from salaries / wages of civil servants who are unionisable employees, but are not members of the 5th Respondent and who are benefiting from the CBA registered on 20/12/2017 under RCA No 384 of 2017.
3. The Petitioner avers that Legal Notice No 19 was issued in respect of the Collective Bargaining Agreements (CBA) signed and registered at NBI ELRC as RCA No 384 of 2017, on 20.12.2017, between the 5th Respondent (the Union) and the Government of Kenya (the Employer).
4. The Petitioner avers that the 3rd Respondent does not have any legal or constitutional mandate to effect any deduction from the wages / salaries of civil servants as the targeted employees are not its employees, such an order is therefore not enforceable in law.
5. The Petitioner avers that vide a letter dated 10.01.2023, the 5th Respondent demanded that the 2nd Respondent implements or effects the legal notice upon all its unionisable employees/
6. The Petitioner avers that the entry point for professionals into the civil service starts from job Group "K". These professionals include; - labour/employment officers, registrars and safety officers, regulators, conciliators, assessors, inspectors, deployed in respective offices established under the [Labour Institutions Act](#), and the [Occupational Safety and Health Act](#).



7. The Petitioner avers that the functions of the said professionals are already in conflict with the expectation of employer and/or the trade union.
8. The Petitioner avers that the conflict emanates from the nature of their functions that touch on forceful encroachment in workplaces of the employer in respect to labour and occupational, safety and health officers. Secondly, the Registrar of Trade Unions are required to register, regulate and cancel registration of a trade union. And the Director of Employment, Labour Commissioner, formulate employment policies, cause labour inspections and audits, conciliations, issue Labour reports and recommendations among other activities.
9. The Petitioner avers that the officers' statutory functions limit them from being members of a Trade Union and / or be in management. They are therefore not eligible to be members of the 5th Respondent and as a consequence, the deductions of Agency Fee will indirectly impose union membership upon them.
10. The Petitioner avers that the offices under the [Labour Institutions Act](#) and the [Occupational Safety and Health Act](#) are anchors between the Employers and Employees (trade unions) so as to create a tripartite cooperation where the government plays a pivotal role as an independent and impartial arbiter in dispute resolution.
11. The Petitioner avers that If the application of Sections 4, 48 and 49 of [Labour Relations Act](#) is granted to affect offices established by the [Labour Institutions Act](#), the role of the government as neutral, independent and impartial arbiter in matters of trade disputes will be lost and principles underpinning the Industrial Relations Charter in a tripartite arrangement shall remain conflicted. The consequences of this is to slow the economic growth and to kill enterprises and industries.
12. The Petitioner avers that the section 49 of the [Labour Relations Act](#) which permits agency fee lacks a legal regulation contemplated under section 83 of the Act. Hence, it offends labour and employment rights, and the principles upon which the tripartite social partners cooperation is anchored.

1st Respondent's Case

13. The 1st Respondent avers that it has been wrongly joined to the suit as it is not a party to the CBA being challenges nor did it participate in issuing the Legal Notice No 19 dated 26/01/2022, published on 06/02/2022.
14. The 1st Respondent avers that it is not responsible for managing the payroll for civil servants and is therefore not in a position to stop implementation of the legal notice.
15. The 1st Respondent avers that it has never imposed an association on the unionisable employees as alleged by the Petitioner.

5th Respondent's Case

16. The 5th Respondent avers that it signed a CBA dated 27.06.2017 on the terms and condition of employment for unionisable employees of the national government. The unionisable employees who are its members have been and continue to enjoy the benefits of the CBA pursuant to section 49 of the [Labour Relations Act](#), it has the right to charge agency fee as a legal requirement.
17. The 5th Respondent avers that Section 49(5) of the [Labour Relations Act](#) allows the 3rd Respondent to deduct and remit to the 5th Respondent agency fees from the wages of an employee covered by its CBA.



18. The 5th Respondent avers that the Petitioner has not stated the particulars which will occasion compromise of the stated civil servants in their independence and impartiality in discharging their statutory mandate. Neither has it indicated that the affected members do not enjoy the benefits of the CBA entered by the 5th Respondent nor how the deduction of agency fee will interfere with their statutory duties.
19. The 5th Respondent avers that the CBA exists to assure reasonable working conditions for the employees within the category the union is registered to represent. An employee benefitting and enjoying better working conditions from the CBA, the statutory regime requires such an employee contributes to the union by way of statutory agency fees which does not undermine the employee's right not to form, join or participate in union activities.
20. The 5th Respondent avers that the application of the stated sections is not unconstitutional by the reason that regulation under Section 83 of the [Labour Relations Act](#) is not applied as it does not impose a mandatory obligation on the Ministry to regulate the provisions of the Act.
21. The 5th Respondent avers that there is no conflict of interest that will arise if the stated members are subjected to deduction of agency fees as they benefit from the CBA agreements of various trade unions.
22. The 5th Respondent avers that union dues and agency fees provided under the [Labour Relations Act](#) are distinct payments made by members of a recognised trade union and unionisable non-members benefitting from the CBA negotiated by recognised trade union. Therefore, it is a lawful charge which does not violate any rights or freedoms guaranteed to employees under the [Constitution](#) and applicable law.

Petitioner's Submissions

23. The Petitioner submitted that in accordance with the provisions of Section 49(3) of the [Labour Relations Act](#), the order by the Minister can only be directed to the employer who has concluded a collective bargain with a trade union. The employees in the civil service are employees of the 1st Respondent as provided in Article 234 of the [Constitution](#) of Kenya, 2010 and as read with Part 5, 6 and 7 of the [Public Service Commission Act](#), therefore, the order issued by the 2nd Respondent and contained in the Legal Notice No 19 dated 26/01/2022 cannot be enforced by the 3rd Respondent,
24. The Petitioner submitted that where agency fee is capped at the members' subscriptions it is excessive and not proportionate to the service level offered to non members. The 2nd Respondent has failed to apply Section 83 of the [Labour Relations Act](#), to bring equitable remedies to non members of trade unions. Therefore, the actions of the 2nd Respondent indirectly force employees to belong to a trade union and hence limiting the employee's freedom of association contrary to Article 36 of the [Constitution](#).
25. The Petitioner submitted that Section 49(2) (c) of the [Labour Relations Act](#) purports to give trade unions a right to determine what a non member of a trade union should pay as agency fee which may not exceed the applicable trade union dues. This is contrary to public policy as the chargee is given the right to determine, what he or she should charge the opponent.
26. The Petitioner further submitted that Section 49 of the [Labour Relations Act](#) does not provide mechanism of redress to the aggrieved employees; it has been used by trade unions to punish employees who do not subscribe to its the ideologies. Therefore, Section 49 of the [Labour Relations Act](#) is arbitrary and falls below Articles 40, 41, 47 and 50 of the [Constitution](#).



27. The Petitioner submitted that the 2nd Respondent is a constitutional duty bearer and must exercise his statutory duty under Articles 1(3) (b) and 19 of the Constitution and cannot be allowed to abdicate his duty to trade unions thereby subjecting a substantial section of union employees who are not members of trade unions to excesses of trade unions.
28. The Petitioner submitted that some of the statutory offices established under the Labour Institutions Act and Occupational Safety and Health Act, such as labour officers and safety officers are vested with prosecutorial powers. These officers cannot remain neutral, impartial and or independent, if they still submit their loyalty to either the trade unions or management.
29. It is the Petitioner's submission that Sections 4 and 48 of the Labour Relations Act be amended or regulated to remove these officers with statutory functions from being members of the unions within the bargain units to protect their impartiality/independence/decisions.
30. The Petitioner submitted that the 3rd Respondent and / or the 1st Respondent, have been directed to effect agency fees on more than 88, 000 employees whereas the 5th respondent has a membership of not more 31, 000. Therefore, 5th Respondent is a minority trade union pursuant to Section 14(1) (d) (i) of the LRA, is not a representative trade union and hence did not have capacity under Section 49(1) of the Labour Relations Act to enter a collective bargain agreement on behalf of unionisable employees in the civil service.
31. The Petitioner submitted that representative authority of registered trade unions a bargain unit fades away once the membership goes below the threshold provided under Sections 14 and 54 of the Labour Relations Act.

1st Respondent's Submissions

32. The 1st Respondent submitted that it has no role in the deduction of agency fees as it is the 3rd Respondent that has been directed to deduct the same.

5th Respondent's Submissions

33. The 5th Respondent submitted that where a unionisable member is benefiting from the existing CBA, the deduction of agency fees is lawful and therefore, it does not violate any constitutional rights as it is lawful to make such deductions.
34. The 5th Respondent submitted that the Petitioner/Applicant has not shown how the rights of unionisable civil servants not being members of the 5th Respondents, but benefiting from its activities, will be violated if the conservatory orders are declined.
35. The 5th Respondent submitted that it signed a CBA dated 27.06.2017 on the terms and condition of employment for unionisable employees of the National Government. The unionisable employees have been and continue to enjoy the benefits of the CBA and pursuant to section 49 of the Labour Relations Act, therefore, the 5th Respondent has the right to charge agency fees as a legal requirement.
36. The 5th Respondent submitted that the purpose of agency fees is to compel non-union members who benefit from the union negotiated collective bargaining agreement to contribute to the cost of negotiating the collective Bargain agreement.
37. The 5th Respondent submitted that the Petitioner lacks *prima facie* case as the Gazette Notice No 19 was lawfully published and there exists a valid CBA registered by this Court in RCA No 384 of 2017. Section 49 of the Labour Relations Act lays the foundation for the deduction of agency fees from



unionisable employees covered by a CBA and an employer directed by the Minister to make deductions pursuant to section 49(3) of the Labour Relations Act as this is the law.

38. The 5th Respondent submitted that the Applicant has not proved they will suffer irreparable harm if the injunction is withheld. The loss to be suffered is deduction of Agency fees from their salaries quantifiable into monetary terms and capable of monetary compensation.
39. The 5th Respondent submitted that the balance of convenience tilts in its favour because section 49 of the Labour Relation Act entitles it to deduction of Agency fee from the wages of the unionisable staff who enjoy the benefits under a CBA it negotiated.
40. The 5th Respondent submitted that this Honourable Court is competent to hear and determined the instant Petition as the matters raised are not novel, weighty and complex enough as similar matters have been successfully determined by the Courts. The question raised is a based-on deduction of agency fees pursuant to Section 49 of the Labour Relations Act and does not raise a substantial question of law, which has not been determined and settled by the Employment and Labour Relations Court.

The 2nd,3rd and 4th Respondents' Submissions

41. The Respondents submitted that the application was brought after inordinate delay and therefore the Petitioner is not entitled to the award of any of the equitable remedies sought in their application.
42. The Respondents submitted that the Legal Notice challenged was issued on 26.01.2022 and the Petition and application herein was filed on the 17.03.2023. The Applicant has not bothered to explain the reasons as to why the application was not filed on time, hence, the Applicant does not deserve issuance of conservatory orders.
43. The Respondents submitted that the application does not meet the threshold for grant of conservatory reliefs as was the principle/position adopted by the court in Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR.
44. The Respondents submitted that the Applicant has no *prima facie* case. The Applicant alleges that the legal Notice is unconstitutional for reasons that it enhances deduction of union dues to its non-members, which will effect deductions on civil servants who are policy makers and perform specialized functions therefore it offends the fair labour practices.
45. The Respondents submitted that despite these allegations no single document has been attached concerning the list of these employees/civil servants and their job groups hence the prayers are made in vain and mere blanket condemnation. Secondly, the prayers sought in the application are substantive and ought to be granted once the petition is heard on merit.
46. The Respondents submitted that the Applicant has not demonstrated any prejudice it is likely to suffer if the conservatory orders are not issued. The said deduction has been carried on by government since the inception of the Legal Notice dated 26.01.2022, if the said deduction is stopped abruptly without due notice to the government at the interim stage, the same might substantially affect government system operations.

Analysis and Determination

47. The main issue for determination is whether the Petitioner/ Applicant is entitled to the conservatory orders sought.



48. The Supreme Court in *Haki Na Sberia Initiative v Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)* (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR) (Civ) (3 December 2021) (Ruling) discussed the threshold of conservatory orders as follows:

“The principles that guide this court in determining applications for conservatory orders are now old hat, but bear repeating nonetheless. As enunciated in this court’s decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (supra) are:

- a) The Appeal or intended appeal is arguable and not frivolous
- b) Unless the orders sought are granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory
- c) That it is in public interest that the conservatory orders be granted.

It must be remembered that the question whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the court, at this stage must not make any definitive findings of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.

On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.

prima facie case

49. In the cause 643 of 2020 *Fidelis Omwaba Onsongo v Tailors & Textiles Workers Union* court observed “irreparable harm is understood to mean damage or injury which cannot be computed or compensated in monetary terms.”

Similarly, in the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* (2016) eKLR the court described Irreparable harms as follows:

” in order to show irreparable harm the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.”

The court in the case of *Fidelis Omwamba Onsanga* (supra) observed that a loss to be suffered is deduction of union dues and agency fees from their salaries. It means the injury is quantifiable into monetary terms and capable of monetary compensation.

50. So even in this instant case the petitioner has not demonstrated a situation of irreparable harm as a result of deduction of agency dues. In any event the same were implemented from early 2022 vide gazette dated 6th February 2022 and have continued to be deducted.

51. Justice W. Korir held in *Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 others; Independent Electoral and Boundaries Commission* [2021] eKLR that:

“When a court is called upon to determine whether a *prima facie* case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case



of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR the Court posited that:

“It is in my view not enough to merely establish a *prima facie* case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis...”

52. In the instant application, the Petitioner/Applicant have raised the following issues:- the constitutionality of 2nd Respondent’s direction to the 3rd Respondent to deduct Agency Fee as per deduction Order directing the 3rd Respondent to deduct 1.5% Agency Fee from salaries/wages of civil servants who are unionisable employees, who are non-members of the 5th Respondent; the constitutionality of Section 49(5) of the *Labour Relations Act*; and whether the subject employees should be exempt from the agency fee deduction on grounds of the nature of their work.
53. The issues raised by the Petitioner/Applicant raise arguable points which can be heard and determined during the hearing of the main petition but the petitioner will need to proceed to supply a list of the affected employees and their positions or job groups. The same will also prove if the 5th respondent has met the threshold of a simple majority in the membership of 1st respondent.
54. Further to the above in the case of *Isaiyah Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party)* [2022] eKLR, the court held:
- “This second requirement for the granting of conservatory orders dictates that an Applicant must demonstrate that if the application is not allowed, the substratum of the Petition will be lost and as such the main claim will be rendered nugatory. In other words, the Applicant will suffer prejudice.
- Put differently, an Applicant must show, albeit on the face of it, that if not granted conservatory orders, the objective of the Petition to forestall the continued or threatened violation of the rights and fundamental freedoms or the *Constitution* will irredeemably be lost and there would be no need to further pursue to main Petition.”
55. In the instant case the court agrees with the decision in the case of *Kenya Hotels and Allied Workers Union v hon the Attorney General & others* (2015) eKLR where the court held: “we also do not think that agency fees constitute interference with freedom of association as an employee paying agency fee to the union that negotiates the collective bargaining agreement is not prohibited from joining any other union of their choice. The court further ruled that where a unionisable member is benefiting from CBA the deduction of agency fees is in the law- *Kenya Union of Journalists and Allied Workers v Nation Media Group Limited and another* Cause No 799 of 2020.
56. The court has considered this application critically and is not satisfied it raises issues to qualify to empanel a bench of more than one judge. In the case of *Peter Gichira v The Attorney General & others* Petitions No 313 of 2015 the court held that to empanel a bench of more than one Judge ought to be made where it is absolutely necessary and in strict compliance with relevant constitutional and statutory provisions.
57. The questions raised by the petitioner on deduction of agency fees is provided in section 49 of *Labour Relations Act* 2007. The matters raised are therefore not complex and do not require to have a bench of more than one judge empanelled.



58. In conclusion, the questions raised by the petitioner are neither a violation of any statutory law nor is it a constitutional violation. Should the petitioner suffer any damage because of agency fee deductions they have not proved that the respondents would not be able to refund them and so the question of irreparable damage is not established.
59. The court having considered all the pleadings and submissions as well as the law it is satisfied that the petitioner has not succeeded in meeting the threshold of grant of conservatory orders.
60. The notice of motion dated 17th March 2023 is therefore dismissed.
61. Each party to meet their costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

