



**Transport Workers Union v Spedag Interfreight Kenya Limited (Cause 98 & 26 of 2019 & 479 of 2018 (Consolidated)) [2024] KEELRC 2400 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2400 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 98 & 26 OF 2019 & 479 OF 2018 (CONSOLIDATED)**

**M MBARŪ, J**

**OCTOBER 1, 2024**

**BETWEEN**

**TRANSPORT WORKERS UNION ..... CLAIMANT**

**AND**

**SPEDAG INTERFREIGHT KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant is seeking the following orders;
  1. An Order be and is hereby issued compelling the respondent to implement and comply with the Transport Workers Union Deduction of Agency Fees Order, 2018 contained in Legal Notice No.130 dated 13 June 2018 and published in the Kenya Gazette Supplement No.83 (Legislative Supplement No.37) dated 26 June 2018]
  2. There be and is hereby issued an order compelling the respondent to pay to the claimant from its funds the unremitted agency fees for all the unionisable employees covered by Legal Notice No.130 dated 13 June 2018 for the period commencing from July 2018 and for all the subsequent months until full implementation.
  3. An order be and is hereby issued compelling the respondent to abide by and implement fully clause 3.2 of the parties' Collective Bargaining Agreement (CBA) dated 17 July 2017 by increasing the wages of all unionisable employees by 8% backdated to 1<sup>st</sup> April 2018 and to pay all the said employees all the outstanding salary arrears resulting from the said increase.
  4. That the court do order the Mombasa County Labour Officer to assist in the computation of the amounts due to the claimant on account of unremitted agency fees and to the claimant's unionisable members on account of salary arrears.
  5. Costs of this suit be paid by the respondent.



2. The claimant is a registered trade union with the mandate to represent unionisable employees in the transport and allied sectors. The respondent is a limited liability company in the logistics and transportation sector.
3. The employees of the respondent company are members of the claimant union. Parties have a CBA covering the implementation period from 1<sup>st</sup> April 2017 to 31<sup>st</sup> March 2019.
4. Under the CBA, agency fees are deductible from unionisable employees' wages covered by the CBA according to Section 49 of the *Labour Relations Act*.
5. The claim is that the Labour Officer recommended that the respondent should effect the agreed 8% wage increase required under the CBA for unionisable employees of the respondent. The respondent should further deduct and remit union dues to the claimant including agency fees from unionisable employees who are not its members but are covered under the CBA according to Section 49(1) and (5) of the Labour Relation Act.
6. The claimant applied for an Agency Fee Order from the Minister and the same was issued through gazette Notice on 26 June 2018 as Legal Notice No.130.
7. The Order is binding and applicable to 13 employers including the respondent who has failed to comply.
8. The claimant reported a dispute with the Minister and a recommendation was issued requiring the respondent under Item 9(1) to adhere to Leal Notice No.130 of 2018. The matter went for conciliation on the refusal by the respondent to comply with the CBA. The respondent has refused to implement the Agency Fee deduction and should pay from its funds under the provisions of Section 19(6) of the *Employment Act*.
9. The total unionisable employees of the respondent covered under the CBA and who are not members of the claimant are 140. The expected monthly income is Ksh.140 x Ksh.800, 000 = 112,000 per month. The Legal Notice served upon the respondent is in arrears.
10. The claim is also that the respondent has refused to effect CBA clause 3 on a General Wage Increase of 8%.
11. In evidence, the claimant called the general secretary Dan Mihadi who testified that there is a Recognition Agreement governing relations between the parties herein and both have concluded a CBA on terms and conditions of service for unionisable employees. The first CBA by the parties is dated 17 August 1982 when the respondent was operating under the name Interfreights (K) Limited.
12. Under the current registered company name, the claimant secured a simple majority and signed a Recognition Agreement in March 2012. A new CBA was registered in the year 2017 covering the period of April 2017 to March 2019.
13. The respondent implemented the first phase of the CBA but failed in the second phase. The claimant obtained a Ministerial Order, Legal Notice No.130 of 2018 dated 13 June 2018 for the respondent to deduct and remit agency fees but has failed to do so.
14. Mihadi testified that while the case was pending in court, the respondent decided to declare a redundancy which affected several of its members prompting the claimant union to file ELRC Cause No. 98 of 2019 consolidating the various suits herein.



15. The respondent also filed Petition No.262 of 2018 (Nairobi) now under Mombasa Petition No.26 of 2019 where the respondent was seeking for stay of the implementation of Legal Notice No.130 of 2018 and stay of proceedings in Cause No. 479 of 2018.
16. Mihadi testified that the relationship between the parties resulted from the year 2012 when the claimant recruited a simple majority and secured recognition and a CBA registered with the court.
17. Mihadi testified that during the pendency of ELRC Cause No.479 of 2018, the respondent went ahead to declare a redundancy and failed to follow the CBA or the provisions of Section 40 of the *Employment Act*. Under Clause LK of the CBA, the parties agreed that before a redundancy, notice should be issued to the Labour officer and the union. In this case, the respondent failed to notify the claimant signifying non-compliance with the CBA applicable for the period of 1<sup>st</sup> April 2018. Under the CBA, the affected employees should be paid their terminal dues together with 8% salary arrears due from the annual increments addressed under Clause 17 of the CBA. The dues upon redundancy should be;
  - a. Payment in lieu of 2 months' notice;
  - b. Unpaid wages, overtime and allowances;
  - c. Severance pay of 20 days for each year worked;
  - d. Accrued leave days;
  - e. 21 months' salary arrears at 8% since April 2018;
  - f. 12 months compensation for unfair declaration of redundancy.

## **Response**

18. The respondent denied the claims made especially that there was an unfair redundancy process of its employees. Such a matter is without proof.
19. The claimant is not mandated to represent the interests of unionisable employees who are not in its membership or who have refused membership of the union and where the claimant has no majority as required in law cannot claim the standing to representation. Of its employees, only a small number are members of the claimant.
20. The claimant is deliberately misleading the court as the majority of the respondent's employees are not unionized. It is improper for the claimant to purport to represent them in a matter of redundancy declared by the respondent. The claimant is not aware of which employees have been declared redundant or the terms thereof. This denies the claimant the locus standi to bring these proceedings.
21. The alleged CBA between the parties has been disputed by the respondent and the enforceability of the Recognition Agreement is subject to Mombasa ELRC No.479 of 2018 and Mombasa Cause No.26 of 2019 (consolidated) which the court has yet to decide.
22. The respondent issued its employees with a notice dated 3 December 2019, a general notice of the possibility of redundancies as a result of the need to reorganize its business due to a downturn and indicated that it would notify the affected employees. Upon the redundancy, the respondent discharged its obligations in law and the statutory requirements by issuing notice to each affected employee whose position was declared redundant. The right to declare a redundancy is lawful under Section 40 of the *Employment Act*.



23. The redundancy process carried out by the respondent was necessitated by a continuous downturn of business and the claimant's suit in its entirety is *sub judice* as the enforceability of the alleged CBA has been disputed by the respondent and the recognition of the claimant is subject to Mombasa ELRC Cause No.479 of 2018 and Cause No.26 of 2019 (consolidated) and which is pending before the court.
24. The letters dated 16 December 2019 issued by the respondent to each employee affected had a 30-day notice of the intention to declare a redundancy as required under Section 40(1) (b) of the [Employment Act](#). The notice is acknowledged by the county Labour Officer.
25. The respondent had no legal obligation to copy the notices to the claimant as the recognition is not valid and the claimant did not have the majority of employees as its members. The notices issued to the employees invited them to a discussion on the redundancy. The employees were paid their rightful terminal dues and the claims by the claimant are without merit and should be dismissed with costs.
26. In evidence, the respondent called Caroline Kyomuhendo the human resources manager who testified that the claims by the claimant relate to records but they lack majority members from the employees of the respondent. The respondent has no records of the claimant having majority members at any given time. There are only 8 unionized employees who have since written to the respondent seeking to stop the deduction of union dues with effect from June 2024. The allegations that non-unionized employees enjoyed the CBA terms are not correct since each employment contract is personal with specific negotiated terms with nothing to do with the CBA. The negotiated terms are better than the CBA terms. In considering what to pay the employees, the respondent must look at the work and costs to the company which has allowed better pay than provided under the CBA. The respondent has gone ahead to hire a global company to survey the market and guided the industry to allow competitiveness, the employees receive better pay than allowed under the CBA.
27. This has resulted in unionized employees filing letters to cease membership with the claimant. They do not see the benefit of unionization since other employees are enjoying better terms of employment. These employees are already benefiting outside the CBA.
28. MS Caroline testified that there was a meeting with the Minister on the Recognition Agreement. The respondent asked for a copy because none was in its custody. It was not provided. There was a deadlock in the negotiations.
29. The respondent has since applied to the National Labour Board to terminate the Recognition Agreement and the decision is pending. The suggestion by the claimant that there is a decision of the Board is not correct since there is no notice to the respondent. The court should nullify the Recognition Agreement since the claimant does not enjoy the majority threshold and there is continuous exit of the remaining members. The CBA is not valid anymore and the union dues have reduced.
30. Upon cross-examination, the witness testified that she joined the respondent in the year 2019 and saw the Recognition Agreement for the first time in the court documents. The respondent was not aware of this agreement which is indicated as having been signed in the year 2012 by the respondent and the person attending to sign has since left the company. Recognition can only arise where the union enjoys a simple majority which is lacking. The claimant had the CBA registered but the respondent did not look into the details and when this was noted, a petition was filed with the National Labour Board which is still pending.
31. Ms. Caroline testified that the respondent received communication from the claimant to pay agency fees for non-members who were enjoying under the CBA. The claimant attached a list relating to employees in the year 2018 but there has been a change of company names.



32. Legal Notice 130 of 2018 was served upon the respondent. It related to unionisable employees who were benefiting from the CBA and should have paid agency fees. The respondent was not privy to the Legal Notice or the Ministerial Order. The respondent tried to deduct agency fees but the employees complained that this was not fair.
33. Ms. Caroline testified that in the year 2018 a redundancy was declared which affected 34 employees including 6 of the claimant's members. Terminal dues were paid outside the CBA which was not applicable. The affected employees did not challenge the terminal dues paid.
34. By the year 2018, unionisable employees of the respondent were 258. The Legal Notice 130 of 2018 was directed to the 258 employees for payment of agency fees but they were not benefiting from the CBA. Most employees left the claimant membership through handwritten letters to the respondent.
35. The human resources office did not explain to the employees why agency fees were payable. There is no record filed in this regard. The claimant was not invited to the shop floor to explain the deductions per the CBA but the respondent confirmed that the employees were not benefiting from the CBA. The existence of the Recognition Agreement has been challenged in Cause No.479 of 2018 and this is before the National Labour Board.
36. At the close of the hearing, both parties filed written submissions.
37. The claimant submitted that the respondent has challenged the locus standi of the claimant herein to file the claim. On 21<sup>st</sup> March 2012, Ms Nerima Makhisa wrote to the claimant on behalf of the respondent and shared the Recognition Agreement. The respondent signed the same voluntarily. As of June 2011, there were 147 employees of the respondent who were members of the claimant out of a total of 258. The claimant had a simple majority to warrant recognition. In the case of Kenya Aviation Workers Union v Bollore Africa Logistics-Kenya & Another [2016] eKLR, the court held that it is lawful for an employer to deduct agency fees from the wages of an employee covered by a CBA, an employee who is not a member of the trade union. In this case, the claimant is entitled to agency fees arising from the CBA covering all unionisable employees of the respondent.
38. The claimant submitted that Legal Notice 130 of 2018 dated 13 June 2018 is valid and the claimant is entitled to agency fees from the respondent's account. Upon achieving recognition, the claimant has a CBA with the respondent covering unionisable employees. The refusal by the respondent to deduct and remit union dues is contrary to the Ministerial Order. In the case of Tailors & Textile Workers Union v New Wide Garments Kenya (EPZ) Limited [2013] eKLR, the court held that the gains from a negotiated agreement go beyond the union to other employees.
39. The respondent confirmed that it had a total of 153 unionisable employees enjoying the CBA negotiated by the claimant. According to the Legal Notice, the claimant is entitled to agency fees therefrom. The claimant obtained the Legal Notice and Ministerial Order upon due process and following a registered CBA covering 2017/2019. There is a legal duty under Section 49(1) of the [\*Labour Relations Act\*](#) to deduct and remit agency fees.
40. The claimant submitted that there was no due process followed in declaring a redundancy per Section 40 of the [\*Employment Act\*](#) and the CBA.
41. Under Section 48(8) of the LRA, the employer is required to forward to the union notice upon the resignation of any employee from the union as held in Kenya Jockey and Betting Workers Union v Resort Kenya Limited [2024] eKLR. The respondent failed to issue notices to the claimant over any employees who left its membership and the dues owing in agency fees should be deducted from its accounts.



42. The claims by the claimant should be allowed for payment of agency fees from 153 employees; the respondent should implement the second phase of the CBA with an 8% wage increase per the CBA. The claim for overtime allowance and severance pay is due following the unlawful redundancy which the respondent tabulated the dues at 15 days instead of 20 days agreed in the CBA. Following the unfair termination of employment, the employees are entitled to compensation under Sections 40 and 49 of the *Employment Act*.
43. The respondent submitted that in ELRC Cause No.479 of 2018, the claimant union sought orders compelling the respondent to implement and comply with the Ministerial Order on the deduction and remittance of agency fees under Legal Notice 130 dated 13 June 2018. The claimant also sought implementation of clause 3.2 of the CBA dated 17 July 2017 by increasing the wages of all unionisable employees by 8% backdated to 1<sup>st</sup> April 2018.
44. The claim herein was consolidated with ELRC Petition No.262 of 2018 (Nairobi) and Mombasa Petition No.26 of 2019 where the respondent sought to declare that the claimant had acted contrary to its powers and against Article 2, 10, 40, 41, 47 and 50 of *the constitution* where it did not have a Recognition Agreement with the respondent or enjoyed simple majority membership. The respondent also sought orders of Certiorari to quash Gazette Notice No. 130 of 2018 under Section 49(1) of the LRA. The respondent moved the court to protect its constitutional rights over property, fair administrative action, fair Labour practices and fair hearings.
45. The respondent submitted that its petition was on the basis that the claimant had no recognition agreement with the respondent but through deceit misled them into entering into a CBA. The union did not have majority members and hence lacked locus standi in law to engage the respondent. The majority of the unionisable employees who were not members of the claimant refused the deduction of their wages. Legal Notice 130 of 2018 to collect agency fees was wrong and unlawful.
46. The respondent submitted that in ELRC No., 98 of 2019 the union sought orders compelling the respondent to deduct and remit agency fees from its employees declared redundant. These claims are overtaken by events as there was a lawful redundancy. The union lacks a mandate to represent the interests of unionisable employees who are not its members or have refused membership. The claimant union lacks a majority threshold.
47. The respondent applied for the revocation of the Recognition Agreement between it and the claimant before the National Labour Board as provided under Section 54(1) of the LRA. The Board decision is pending.
48. Without a valid Recognition Agreement between the parties, the claimant lacks locus standi to file the suit for employees who are not its members or have declined unionization. In the case of Kenya Shoe and Leather Workers Union v Crown Industries Limited & Another [2017] eKLR the court held that the attainment of a simple majority for purposes of recognition is a matter of evidence. In Modern Soap Factory v Kenya Shoe and Leather Workers Union [2020] eKLR the court held that whether an employee is a union member is a question of fact. In this case, the claimant has no record of the Recognition Agreement to justify the claims made. The CBA filed was obtained through deceit. Without a simple majority, the claimant cannot seek to claim as pleaded.
49. The respondent submitted that there is no binding CBA between the parties under which the claimant can make the claims herein. Without a proper Recognition Agreement, the CBA in force is invalid. The claim for agency fees is not justified nor is the 8% wage increase as held in Kenya National Union of Nurses v County Public Service Board Homa Bay [2018] eKLR. The respondent cannot comply with Legal Notice 130 of 2018 dated 13 June 2018 without the required majority threshold.



50. The respondent followed the due process in declaring a redundancy and the claimant without a valid Recognition Agreement, the CBA is not legitimate and hence the claimant cannot seek to claim under it.

### **Determination**

51. Upon the consolidation of suits, ELRC 98 of 2019, 26 of 2019 and 478 of 2018, the issues consolidated for determination are;
- Whether the claimant has standing to represent unionisable employees of the respondent;
  - Whether the respondent should be compelled to implement agency fees Order, 2018 contained in Legal Notice 130 of 2018 dated 13 June 2018;
  - Whether the respondent should be compelled to pay for its funds the unremitted agency fees due from unionisable employees benefiting from CBA from July 2018;
  - Whether the respondent should be compelled to implement phase two of the CBA with an 8% wage increase backdated from 1<sup>st</sup> April 2018;
  - Whether the court should direct the Mombasa County Labour Officer to enter the shop floor and tabulate the dues owed to the claimant by the respondent;
  - Whether redundancy dues owing to the claimant members should be paid;
  - Who should pay the costs.
52. The identified issues are intertwined under the issue of recognition of the claimant and the registered CBA. Once addressed, all other issues will be cleared.
53. The recognition of a trade union by an employer is regulated under Section 54 of the LRA. Recognition of a trade union by an employer is upon the subject union meeting the condition of recruiting a simple majority of unionisable employees in the employment of the employer. Recognition of a trade union by an employer is for the sole purpose of negotiating a CBA;
- (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees
54. For a union to achieve recognition, there must be the recruitment of members, which precedes the Recognition Agreement. Based on sufficient members [50% +1] recruited, the Employer then, grants recognition to the Union. The recognition Agreement comes after the Union has established that it has a simple majority at the given workplace.
55. As held in the case of Kenya Private Universities Workers Union v Management University of Africa [2021] eKLR, the workplace is dynamic and a union is required to continuously engage in recruitment to secure its majority at the shop floor. With evolving employment status such as terminations, retirements, and or declaration of redundancy, these dynamics must be put into context by the union. To therefore sustain the right to sole CBA negotiations, the trade union should maintain its majority threshold.
56. It is common cause that parties herein have a CBA dated 17 July 2017. The CBA is registered in court and under the provisions of Section 69 of the LRA, it is enforceable on its terms and conditions. To achieve the CBA and have it registered with the court, the procedures adopted for the recognition of the claimant by the respondent are lawful and valid.



57. Under the law, the basis for negotiating a CBA is the Recognition Agreement.
58. Where there is a dispute as to the issue of recognition of the trade union, the provisions of Section 54 (5) and (6) of the LRA apply. The employer must initiate an application with the National Labour Board and give its reasons;
- (5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.
- (6) If there is a dispute as to the right of a trade union to be recognised for collective bargaining in accordance with this section or the cancellation of the recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.
59. Pending the National Labour Board addressing the application seeking to revoke the Recognition Agreement, the same remains valid and the trade union is allowed to negotiate CBA under such recognition.
60. In the case of Kenya National Union of Teachers (Knut) v Nancy Njeri Macharia & another [2020] eKLR the court noted that before the employer can stop the implementation of the Recognition Agreement whatever the reasons, valid or not, it would first have to apply to the National Labour Board and it is only after the Board has granted authority to terminate that it would give notice to the trade union as provided under the Recognition Agreement clauses. A Recognition Agreement being regulated in law must be terminable under the law. It is not at the option of either party to stop its application unilaterally.
61. Further, Section 54 of the LRA which provides for recognition of unions by employers must be read with Section 74 which provides for urgent referrals to court where a dispute concerns recognition.
62. The fact of the respondent making an application with the National Labour Board to revoke the Recognition Agreement with the claimant is evidence that there exists a Recognition Agreement between the parties and from it, a CBA has been negotiated. This gives the claimant proper and legal standing to attend and represent its members in the employment of the respondent.
63. With the Recognition Agreement thus addressed, up and until a revocation is issued, the same is valid and lawful as held in Kenya Union of Entertainment and Music Industry Employees v Bomas of Kenya Limited [2018] eKLR.
64. Upon the registration of the CBA dated 17 July 2017 with the Court, the claimant obtained the Ministerial Order for agency fee deductions through Legal Notice 130 of 2018 dated 13 June 2018. The respondent as a joint signatory to the Recognition Agreement through its officers cannot renege on the terms and conditions thereof on the basis that the claimant has failed to maintain the simple majority at the shop floor. The Mechanisms of Sections 48, 49 and 54 of the LRA must be read together.
65. Upon the successful negotiations of a CBA and registration with the court, the claimant is entitled to union dues from its unionized members and agency fees from unionisable employees who are not unionized. Upon the Recognition Agreement, the claimant became protected under the provisions of Section 59(5) of the LRA;
- (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Court and shall be effective from the date agreed upon by the parties.  
Which must be read together with Section 49(1) of the LRA;



1. A trade union that has concluded a collective agreement registered by the Court with an employer, group of employers or an employers' organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union.
66. In the case of *Tailor and Textile Workers Union v New Wide Garments Kenya (EPZ) Limited Cause No.1624 of 2013*, the court is addressing the issue of why agency fees are payable by unionisable employees who have not joined the union that has negotiated a CBA held that;
67. Under the provisions of Sections 48 and 49 of the *Labour Relations Act*, the law recognizes the fundamental role played by trade unions in securing employee gains with regard to negotiated agreements. These gains not only benefit the union members but also go beyond the union membership to other employees. Where there are benefits that are secured through the efforts of the representative trade union in collective bargaining and are passed on to other employees who are not members of the representative trade union such employees should make contribution towards the costs which the representative union incurs in connection with its collective bargaining work. If they do not pay that is unfair members of the representative union pay for those costs. An agency fee seeks to make them pay without compelling them to join the representative trade union. The fact that such workers may be members of another union in the workplace to which they pay union dues does not turn them into paying riders. They remain free riders as they do not contribute towards the collective bargaining costs of the representative union.”
68. Similarly, in the case of *Amalgamated Union of Kenya Metal Workers v Unity Auto Garage (Nrb) Limited [2014] eKLR* there was a dispute about the nature and effect of the Ministerial Order through a Gazette Notice. The employer challenged the direction to deduct and remit agency fees to the trade union beneficiary of the Ministerial Order. The Court held that the employer was bound to follow the Ministerial Order and Legal Notice as published and directed by the Minister pending any clarification or intervention sought from the Minister.
69. This position is further clarified under Section 49(3) of the LRA that:
  - (3) An employer in respect of whom the Minister has issued an order as specified in subsection (1) shall commence deducting agency fees from the employees named in the Minister's notice within thirty days of receiving the Minister's notice.
70. When then should the deduction and remittance of union dues or agency fees stop?
71. Union dues deduction stops upon the unionized employee writing to the employer indicating that they have ceased membership with the trade union. The employer must issue notice to the subject union and stop remittances within 30 days thereof. The employer has the legal duty under Section 48 (7) and (8) to inform the trade union;
  - (7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.
  - (8) An employer shall forward a copy of any notice of resignation he receives to the trade union.
72. Concerning the deduction and remittance of agency fees, section 49(1) of the LRA applies. The Minister must revoke the Legal Notice giving directions on the deduction and remittance of agency fees.



73. In *Kenya Aviation Workers Union v Bollore Africa Logistics - Kenya & another* [2016] eKLR, the court held that;

... It is therefore lawful for an employer to deduct an agency fees from the wages of an employee covered by a CBA, an employee who is not a member of the trade union. There exists a CBA registered before this Court in RCA No.14 of 2009. With such registration, the Respondent and the interested party were bound by its terms and conditions. Pursuant to the registration of this CBA, I note the Minister published Gazette Notice No.5027 of 2009 giving effect to the applicable law. Contrary to the Claimant's submissions, I find no conflict with regard to the application of sections 48 and 49 of the *Labour Relations Act* as one regulates the deduction of union dues while the other regulates the collection/deduction of agency fees.

74. In this case, the respondent in response asserts that the contracts of employment were personal and negotiated with each employee. The terms and conditions as negotiated were better than the CBA terms. However, once a CBA is registered with the court, it becomes enforceable on its terms and conditions. The respondent was bound under the CBA dated 17 July 2017. To go outside the CBA to negotiate better terms for the employees is encouraged save such ought to have been with the consultation of the claimant as the entity enjoying recognition and representing the interests of unionisable employees in the service of the respondent as held in the case of *Union of Kenya Civil Servants v Kenya Medical Research Institute & another* [2021eKLR].

75. To remove the claimant from the shop floor to negotiate terms and conditions of service for unionisable employees upon the Recognition Agreement was to engage in unfair Labour practices on the part of the respondent. Legal Notice No.130 of 2018 dated 13 June 2018 is valid and subject to implementation by the respondent and agency fees are due from all unionisable employees covered under the CBA.

76. The failure by the respondent to enforce a lawful order and directions by the Ministerial Order through Legal Notice No.130 of 2018 dated 13 June 2018 allowed the employees to enjoy a CBA without payment of agency fees. The due agency fees should be paid by the respondent without victimizing the beneficiary employees in accordance with the provisions of Sections 48 and 50 of the LRA. See *Kenya Long Distance Truck Drivers & Allied Workers Union v Ms Kyoga Hauliers Ltd* [2013] eKLR.

77. The failure to deduct and remit agency fees lawfully due to the claimant by the respondent is in breach of the provisions of Section 19 of the *Employment Act*. Section 19(1)(f) and (g) of the *Employment Act* directs employers to deduct from the employee's wages:

- (f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;
- (g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

therefore, the failure by the respondent to deduct and remittance agency fees to the claimant violates the *Employment Act* and the provisions of Article 41(1)(c) of *the Constitution* read with Sections 4(1) and (2) of the LRA, 2007 and Conventions No, 87 and 98 of the International Labour Organizations that recognize employees' freedom to join and participate in trade unions of their choice and to allow the trade union to enjoy under a negotiated CBA. See *Dadson Maina & 33 Others v Board of Management, Nyeri Primary School* [2017] eKLR.



78. This is aptly captured in the case of Kenya Hotels and Allied Workers Union V Attorney General & 6 others (2015) eKLR that;

It is our opinion that it would not be fair for a union to negotiate for free riders. This would encourage members to withdraw from membership as they would still benefit from the CBA without being members or paying any fee for the union's efforts and expenses for negotiating the CBA. It is also a fact that an employer cannot pay different wages to employees who are union members and those who are not. This would amount to discrimination and it is prohibited by both *the Constitution* and the *Employment Act*. We also do not think that the agency fees constitute interference with freedom of association as an employee paying agency fees to the union that negotiates the CBA is not prohibited from joining any other union of his/her choice.

The only catch is that if the employee chooses to join the membership of a union that is not recognized for negotiation purposes, he would pay a little extra in the form of agency fees to benefit from the negotiated terms. There is nothing unconstitutional about that. A trade union is like a membership club . . . *The Constitution* does not provide that freedom of association should be free of charge . . .

79. I therefore find that the Respondents had a duty to remit agency fees from all unionisable employees not members of the claimant following Legal Notice No.130 of 2018 dated 23 June 2018. Such failure is inexcusable and contrary to the provisions of the LRA.
80. On the issue of clause 3.2 of the CBA requiring the respondent to implement the second phase of the CBA with an 8% wage increase, the analysis above, the CBA was lawful and required the respondent to implement accordingly. The evidence that there were personalized contracts and that the employee opted to resign from the claimant union's membership is left bare.
81. However, without the records to assist the court in assessing the actual contracts and the dues to the claimant in terms of union dues or agency fees, the claim that a Labour Officer be allowed access to examine records is justified.
82. Concerning the issue of redundancy, indeed, as the respondent has submitted, under Section 40 of the *Employment Act*, the employer faced with an economic challenge is legally allowed to issue a notice of intention to declare a redundancy. In the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA, the Court of Appeal held that;
83. While the requirement of consultation was not expressly provided in section 40 of the *Employment Act*, that requirement was implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy was made, the requirement for consultation was provided for in the Kenyan law and implicit in the *Employment Act* itself.
84. Where employees are unionized, notice should be issued to their trade union and the Labour officer. In this case, there is recognition of the claimant union and an existing CBA with terms and conditions and a clause on redundancy. Parties negotiated that upon a redundancy, each affected employee was to be paid severance pay at 20 days. The evidence by the claimant that the affected employees were paid 15 days is contrary to the CBA and the balance is due.



85. Under the CBA, the claimant was entitled to negotiate the redundancy and termination of its members and the payment of terminal dues. Without the necessary records filed by the respondent on the terminal dues paid, the claim that a Labour Officer to enter the shop floor and undertake an assessment is justified.
86. On costs, these proceedings have not been smooth. This is largely to accommodate the respondent who applied with the National Labour Board to revoke the Recognition Agreement. However, as such matter was pending, the least the respondent should have done was to deduct and remit agency fees and secure employees and members of the claimant upon declaration of the redundancy.
87. The procedures of the court are separate and distinct from the mandate of the National Labour Board. With a valid Recognition Agreement and CBA, the respondent had a legal duty to comply pending any Ministerial Order directing as necessary.
88. The claim by the claimant is hereby found with a good foundation. The claimant is entitled to the costs of the suit.
89. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. a declaration that the Recognition Agreement between the parties is valid and lawful;
  - b. a declaration that the CBA dated 17 June 2017 between the parties is lawful and valid;
  - c. an order is hereby issued compelling the respondent to pay agency fees contained in Legal Notice No.130 dated 13 June 2018 to the claimant from its funds;
  - d. an order is hereby issued compelling the respondent to apply clause 3.2 of the CBA dated 17 July 2017 on wage increment backdated to 1<sup>st</sup> April 2018 and pay all unionisable employees an 8% wage increase;
  - e. to address (c ) and (d) above, the Mombasa County Labour Officer to assist the parties and the court in the computation of the amounts due to the claimant on account of unremitted agency fees and to the claimant's unionisable members on account of salary arrears and the due redundancy dues;
  - f. the costs due to the Labour Officer to be met by the respondent;
  - g. A report of the Labour Officer to be submitted in 30 days for the adoption of the court.
  - h. Costs of the suit be paid by the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 1ST DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

