



Banking, Insurance & Finance Union (Kenya) v Family Bank Kenya Ltd (Cause 2192 of 2016) [2023] KEELRC 427 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2192 OF 2016
JK GAKERI, J
FEBRUARY 20, 2023**

**BETWEEN
BANKING, INSURANCE & FINANCE UNION (KENYA) CLAIMANT
AND
FAMILY BANK KENYA LTD RESPONDENT**

JUDGMENT

1. The Claimant initiated the claim by way of a Memorandum of Claim dated and filed on October 27, 2016. The claimant is a registered trade union under the Labour Relations Act No 14 of 2007 Laws of Kenya, while the Respondent is a commercial bank trading in the Republic of Kenya and is a member of Kenya Bankers Association (KBA).
2. The claimant avers that it has a recognition agreement with the Respondent and as a result have entered into several collective bargaining agreements and the latest one was signed on August 19, 2013.
3. The Claimant further avers that on the May 28, 2014 and later August 6, 2014 the union wrote to the Respondent requesting it to deduct and remit agency fee in compliance with Section 49 of the Labour Relations Act but did not receive a response.
4. The claimant union states that it reported the matter to the Ministry of Labour for conciliation and during the conciliation meeting on the 22nd of September 2013 parties were unable to agree and the conciliator issued a certificate of disagreement.
5. The claimant union states that on the May 14, 2014, a settlement was reached between the Banking Insurance and Finance Union and the Kenya Bankers Association in dispute 508 of 2009 that all unionisable non-members employee of the Banking Insurance and Finance Union working in the member banks of Kenya Bankers Association benefitting from the Collective Bargaining Agreement be deducted agency fee from June 1, 2014.



6. The claimant union states that the respondent violated the agreement with impunity by refusing to deduct and remit Agency fee in accordance to section 49 of the *Labour Relations Act*.
7. The Claimant prays for judgment against the Respondent as follows;
 - a. This honorable court be pleased to declare that the claimant is entitled to agency fees from the unionisable employees of the Respondent who are not members of the union.
 - b. This honourable court be pleased to order that the Respondent remit agency fee to the claimant and payment should be effected by a crossed cheque into the claimants account No 01-020-741448-00 at Standard Chartered Bank Limited, Harambee Avenue Branch in accordance with Gazette Notice No 924 of 6th February 2009.
 - c. Costs of this claim.
 - d. Any other relief that this Honourable court deems just.
8. In Response to the claim the Respondent filed a memorandum of Response dated February 26, 2018 where the respondent avers that its membership with Kenya Bankers Association was voluntary and extended to regulatory matters set out by the Central Bank of Kenya and not labour matters.
9. The respondent denies knowledge of the alleged recognition agreement between the claimant and the Kenya Bankers Association. It furthers avers that it is a stranger to the Collective Bargaining Agreements and negotiations entered into by the claimant and the Kenya Bankers Association and the terms that would affect the terms and conditions of employment of all unionisable bank employees.
10. The respondent contends that it has neither been a party to nor participated in any negotiations between the claimant and Kenya Banker's Association.
11. The respondent further states that the claimant assumes that the employees of the Respondent are automatic members of the union which is against the employee's constitutional right to choose whether to be members of a union or not.
12. Further, it avers that its employees have individual contracts of employment thus any attempt to impose the terms and conditions of the CBA that are inferior to their individual contract is unfair, irregular, oppressive and unconstitutional.
13. It is the respondent's case that the claimant's attempt to impose the settlement in Nairobi ELRC 508 of 2009 in respect of agency dues is unconstitutional, irregular, baseless and without merit.
14. The respondent avers that it has a constitutional right to decide whether or not to become a party to claims and liabilities allegedly incurred by the KBA which right is protected under Article 41 of the *Constitution of Kenya, 2010* and the allegation by the claimant that the respondent is automatically liable is superfluous and misconceived.
15. The respondent prays that the honourable court determines the questions as to;
 - a. Whether it is constitutional to bind the respondent to terms and conditions contained in a recognition agreement and CBA produced herein as Appendix BF 1 and 2 respectively when the respondent does not have in its employment unionisable employees or employees who have expressed a wish to join any union



- b. Whether it is constitutional for the Respondent to be called upon by the claimant to meet agency fee for employees who have not expressed a wish to join the claimant union and whose terms are higher and superior to those offered by the claimants CBA.
- c. Whether the constitutional right to freedom of association is violated when the claimant seeks to enforce terms and conditions of a CBA with Respect employees with distinct yet undisclosed and unknown terms of employment.

16. The respondent prays that the claimant's case be dismissed with costs.

Evidence

- 17. The claimant called one witness Issac Munoru Mucheke who adopted his witness statement dated March 24, 2016.
- 18. The witness stated that the recognition agreement between the claimant and the Kenya Bankers Association binds the Respondent who is a member of the Kenya Bankers Association hence the need to remit the Agency fee to claimant. He testified that he was not privy to the individual contracts of employment between the respondent and its employees but stated that their terms were inferior to the CBA. He confirmed that none of the employees of the respondent were union members.
- 19. The respondent on the other hand called one Joan Gachomba who adopted her witness statement dated September 16, 2022. In her evidence, RWI stated that the Respondent does not have unionisable employees as the lowest cadre in the Bank is Accountants who have a Bachelor's degree and have individual contracts.
- 20. The witness further stated that the respondent does not have any collective bargaining agreement with Kenya Bankers Association and that the requirement to deduct agency fee was done without consent and participation of the respondent.
- 21. On re-examination, the witness testified that although the Respondent had unionisable employees, he had no list of the employees as the respondent had not provided one and the list was not static.
- 22. The witness confirmed that the Respondent was a member of the KBA and that the settlement of Agency Fees involved the NIC and 41 other members. That the Gazette Notice between the Claimant and the KBA required every member of KBA to deduct Agency Fees from unionisable employees but maintained that the bank had no unionisable employees.
- 23. The witness acknowledged receipt of the Claimant's letters dated May 28, 2014 and August 6, 2014 which the respondent did not respond to.

Claimant's Submissions

- 24. The Claimant highlighted the following issues for determination;
 - i. Whether unionisable employees of the Respondent are covered by the Collective Bargaining Agreement (CBA) signed between the claimant and Kenya Bankers Association and therefore binds the Respondent.
 - ii. Whether the level of the union representation is from subordinate staff to supervisors (section heads) or whether there are unionisable employees in the respondent bank or not.



- iii. Whether the claimant is entitled to agency fee from the unionisable employees of the respondent who are not members of the claimant but are covered by the CBA as provided for under Section 49 of the *Labour Relations Act*.
 - iv. Whether the claimant is entitled to the reliefs sought
25. The claimant submitted that it had an existing Recognition Agreement and a Collective Bargaining Agreement with the Kenya Bankers Association. That the recognition agreement provided for the mode of operation between the parties while the Collective Bargaining Agreement sets out the terms and conditions of service for all unionisable employees of member banks.
 26. The claimant further submitted that the recognition agreement complied with Article 27 of the *Constitution* and Section 5 of the *Employment Act, 2007* by prohibiting the employer and the union from victimization or discrimination of unionisable employees on the basis of non-membership of the union.
 27. The claimant submitted that the CBA was binding on all members of the association without exception. It submitted that the terms under CBA were more favourable than the terms under individual contracts and the CBA required that the terms of the CBA be part of the conditions of service of all unionisable employees.
 28. The claimant relied on the holding in *Banking Insurance and Finance Union v Middle East Bank Kenya Limited* (2020) eKLR, where the court observed that all employees cannot be managers in any establishment.
 29. On the 2nd issue, the claimant submitted that Clause A0 of the CBA on job profiles provided that unionisable employees included Section heads (Supervisors), Check Clerks, Clerical staff and copy typist, technical staff and subordinate staff.
 30. The claimant further submitted that the respondent's witness confirmed that the respondent had employees performing the functions and categories set out under the preamble of the CBA.
 31. On the third issue, the claimant submitted that since the respondent was a member of Kenya Bankers Association, it was bound by the Recognition Agreement and the Collective Bargaining Agreement executed by the claimant and the Kenya Bankers Association and all the unionisable employees of the bank were eligible to pay the Agency fee because they were covered by the Collective Bargaining Agreement.
 32. It was the claimant's submission that Section 49(1)(b) of the *Labour Relations Act* required the employer to supply a list of employees in respect of whom deduction shall be made and the respondent has failed to comply with that provision or the Gazette Notice No 924 of 2009 which binds all banks to comply with the deduction of Agency fee.
 33. The claimant relied on the holding by Lady Justice Mbaru in *Kenya Aviation Workers Union v Bollore Africa Logistics & Another* where the court held;

“It is therefore lawful for an employer to deduct agency fee 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 the court in RCA No 14 of 2009. With such registration the Respondent and the interested party are bound by its terms and conditions. . .”



34. The claimant further relied on the holding in *Amalgamated Union of Kenya Metal Workers V Toyota Kenya Limited* where Wasilwa J. held as follows;

“The reading of the section shows that agency fee is collectable after signing of a Collective Bargaining Agreement. The applicant and the respondent had collective bargaining agreements that preceded the current Collective Bargaining Agreement. Section 49 does not relate to the signing of a particular collective bargaining agreement so long as the parties have a subsisting CBA. Since there is already an order made by the minister in respect of deduction of agency fees the order does not expire simply because the collective bargaining agreement existing lapses when there is in existence yet another renewed Collective Bargaining Agreement.”

35. Reliance was also made on the sentiments of the court in *Kenya Plantation and Agriculture Workers Union v Agricultural Employers Association* (2016) eKLR where the court stated;

“The flower grower members of Agricultural Employers Association are hereby restrained and prohibited from non-compliance with Gazette Notice No 13212 dated 26.10.2010 ordering the association to deduct and remit the Agency fees from all unionisable employees covered by the Collective Bargaining Agreement between the union and the association.”

36. The claimant urged the court to find that it was entitled to the reliefs sought.

Respondent’s submissions

37. The Respondent highlighted the following issues for determination;

- i. Whether the Respondent has unionisable employees.
- ii. Whether the employees of the Respondent who are not union members derive any benefit from the CBA.
- iii. Constitutional issues raised by the Respondent in its memorandum of response.

38. On the first issue, the respondent submitted that it did not have unionisable employees as subordinate and technical staff were outsourced from independent contractors. The respondent further submitted that the claimant had not provided a list of Respondent’s employees who were unionised.

39. The respondent relied on the decision in *Banking Insurance and Finance Union(Kenya) v Paramount Universal Bank Kenya Ltd* (2021) eKLR to reinforce the submission.

40. Further, it was the respondent’s submission that Section 49 of the *Labour Relations Act* required an employer who had a CBA with a trade union to deduct Agency fees from the employees who have benefitted from the CBA and were not members of the trade union.

41. The respondent submitted that the terms of employment to its employees were superior to those in the Collective Bargaining Agreement. It further submitted that much as the employees had the right to join a trade union, they had not done so as the superior terms that were more beneficial to them and as such the respondent was not obligated to deduct Agency fee and the intervention of the claimant was not necessary.

42. The respondent further urged that the claimant had failed to prove that the respondent’s employees derived any benefit from the CBA it had negotiated and concluded with the KBA.



43. That the claimant's attempt to impose the settlement in ELRC No 508 of 2009 in respect of Agency fee was unconstitutional, irregular, baseless and without merit.
44. Finally, the respondent submitted that the claimant had not proved its case and urged the court to dismiss the same with costs.

Analysis & determination

45. Having analyzed the pleadings and the rival submissions, the issues that commend themselves for determination are;
 - i. Whether the Claimant is entitled to Agency fee?
 - ii. Whether the Respondent has unionisable employees?
 - iii. Whether the claimant is entitled to the reliefs sought?
46. On the first issue, parties have adopted contrasting arguments. While the Claimant's counsel submitted that the Respondent was obligated to remit Agency fee to the Claimant by virtue of Section 49(1) of the [%2012of2007.pdf Labour Institution Act](#), pursuant to the CBA and recognition agreement and being a member of the Kenya Bankers Association, the Respondent's counsel urged that the Respondent was not liable to pay any Agency fee as it had no unionisable employees or members of the Claimant union as its terms and conditions of service were superior to those of the CBA.
47. The pith and substance of the Claimant's case is that the Respondent had employees performing the roles set out in the preamble to the CBA between the Claimant and the KBA and therefore had unionisable employees. Although the Respondent's witness testified that some of the roles and functions set out in the preamble were performed by professionals such as accountants who had individual contracts. The Respondent's witness did not avail a sample of the contract or demonstrate the terms and conditions of its employees.
48. Relatedly, the fact that the roles and functions in the preamble to the CBA were being performed by accountants would not necessarily mean that the Accountants were not unionisable, granted that subordinate staff and technical staff roles were outsourced.
49. It requires no emphasis that Agency fee is only payable by unionisable employees who are not members of the union and who are benefiting from the CBA.
50. Puzzlingly, the Claimant adduced no evidence that any employee of the Respondent was its member which would buttress its case for Agency fee.
51. Section 49(1) of the [Labour Relations Act](#) provides for the payment of Agency fee as follows;
 1. A trade union that has concluded a collective agreement registered by the Industrial 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.
 2. A request in accordance with sub-section (1) shall—
 - (a) be signed by the authorized representatives of the trade union and employer, group of employers or employers' organisation;



- (b) supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;
 - (c) specify the amount of the agency fee, which may not exceed the applicable trade union dues; and
 - (d) specify the trade union account into which the dues shall be paid
52. It is not disputed that the claimant and Kenya Bankers Association have a recognition agreement. However, the claimant and the respondent do not have a Recognition Agreement or a Collective Bargaining Agreement. Equally not in dispute is the recognition agreement and a CBA between the claimant and Kenya Bankers Association. The respondent is a member of the Association, listed as Member No 19 in Appendix “A” of the Recognition Agreement. Since the respondent is a voluntary member of the KBA which recognizes the claimant union as the negotiating body representing employees of members of the Association, excluding officers and Section 49 (1) of the [Labour Relations Act](#) is applicable.
53. For a trade union to have Agency fee deducted from wages of unionisable employees covered by the CBA but who are not members of the union, the union must make a request to the Minister for an order to that effect and the request must be in compliance with the provisions of Section 49(2) of the [Labour Relations Act](#) in terms of signatures, list of the employees concerned, amount of Agency fees and the account into which the dues shall be paid.
54. The Claimant did not avail the Minister’s Order containing the list of the employees of the respondent from whose wages Agency fee was deductible, the amount deductible and the account into which the dues were to be deposited.
55. Indeed, the Claimant adduced no evidence that it had made a request to the Minister.
56. Significantly, the Respondent maintained in its pleadings and evidence that it did not have unionisable employees within its ranks and it was the duty of the Claimant to show that indeed the Respondent had unionisable employees as provided by the [Evidence Act](#).
57. This court need not belabour that union membership is voluntary and employees have a constitutionally guaranteed right to join a union of their choice where they feel their interests will be best secured.
58. In the instant case, the claimant failed to demonstrate who the unionisable employees of the respondent were or provide a list of those from whose wages Agency fee is deductible.
59. Section 107 and 109 of the [Evidence Act](#) places the burden of proof on the party that alleges and in this case it is the Claimant. It was incumbent upon the Claimant to show that the respondent had unionisable employees and in the first instance, produce a list of unionisable employees who were benefitting from the Collective Bargaining Agreement and finally an order authorizing the deduction of Agency fees as required by the provisions of Section 49 of the [Labour Relations Act, 2007](#).
60. For the foregoing reasons, the court is satisfied and finds that the respondent has on a balance of probabilities failed to prove that the respondent had any unionisable employees who were benefitting from the CBA and thus liable to pay Agency fee.
61. Relatedly, the absence of the Ministers Order envisioned by Section 49(1) of the [Labour Relations Act](#) further weakened the Claimant’s case.
62. The foregoing disposes issues 1 and 2.



63. As regards the reliefs sought, the court proceeds as follows;
64. On the declaration sought, having found that the Claimant has failed to prove that the respondent bank had unionisable employees who were either members of the union or were benefiting from the CBA while not being members of the union, the court is not persuaded that the declaration sought is merited and the same is declined.
65. On the order to direct the respondent to remit Agency fees pursuant to Gazette Notice No 924 of 2009, the court is aware of the Ministers Order but the Claimant did not furnish the list of the employees concerned as demanded by Section 49(1) of the Act which is unambiguous that the deductions apply to employees on the list supplied by the Respondent which the claimant was to avail to the Minister as part of its request.
66. In the absence of the list of unionisable employees from whose wages deduction of Agency fee was to be made, the court is satisfied that the order sought is unmerited and is accordingly disallowed.
67. From the foregoing, it is evident that the Claimant's case is for dismissal and is accordingly dismissed with costs.
68. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF FEBRUARY 2023

DR. JACOB GAKERI

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 Civil 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.

