



**Mutua & 5 others v Bollore Transport Ltd & another; Cabinet Secretary,  
Labour and Social Protection & another (Interested Parties) (Cause  
E045 of 2022) [2023] KEELRC 992 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 992 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E045 OF 2022**

**AK NZEI, J  
APRIL 20, 2023**

**BETWEEN**

**GEDION MUTUA & 5 OTHERS ..... CLAIMANT**

**AND**

**KENYA AVIATION WORKERS UNION ..... 1<sup>ST</sup> RESPONDENT**

**BOLLORE TRANSPORT LTD ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE CABINET SECRETARY, LABOUR AND SOCIAL  
PROTECTION ..... INTERESTED PARTY**

**KENYA SHIPPING, CLEARING, FREIGHT LOGISTICS & WAREHOUSE  
WORKERS UNION ..... INTERESTED PARTY**

**RULING**

1. The suit herein was instituted by the Claimants on June 16, 2022 vide a Memorandum of Claim dated June 3, 2022; whereby the following reliefs are sought:-
  - a. a declaration that the 1<sup>st</sup> Respondent's cause of action executed starting January 1, 2018, and by deducting (sic) two per cent (2%) of salaries from Claimants and all those unionisable employees who are not members of the 2<sup>nd</sup> Respondent in the guise of agency fee was unfair, unlawful, wrongful, irregular and violated Section 19 of the *Employment Act*.
  - b. a declaration that the 1<sup>st</sup> Respondent's cause of action executed starting January 1, 2018, and by deducting two per cent (2%) of salaries from Claimants and all those unionisable employees who are not members of the 2<sup>nd</sup> Respondent in the guise of agency fees did not meet and/or



conform to the requirements set out by Section 49 of the Labour Relations Act 2007, and as such the said cause of action was/and is still unauthorized, flawed, invalid, null, void *ab initio*.

- c. that an order be issued directing the 1<sup>st</sup> Respondent to refund to the Claimants and all other unionisable employees all monies deducted from their salaries in the guise of agency fees since January 1, 2018.
  - d. that an order be issued directing the 2<sup>nd</sup> Respondent to refund to the Claimants and all other unionisable employees all monies deducted from their salaries in the name of agency fees and in favour of the 2<sup>nd</sup> Respondent.
  - e. a permanent order of injunction barring the 1<sup>st</sup> Respondent from deducting agency fees from salaries of unionisable employees without a valid ministerial order issued by the 1<sup>st</sup> interested party pursuant to Section 49 of the Labour Relations Act 2007.
  - f. costs of the suit and interest at Court rates.
2. The Claimants pleaded, *inter-alia*:-
- a. that the Claimants are unionisable employees of the 1<sup>st</sup> Respondent, and that on May 17, 2016, a Collective Bargaining Agreement was signed between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents herein, and was subsequently registered by this Court under RCA 70 of 2016.
  - b. that the 1<sup>st</sup> Interested Party issued an Order vide Kenya Gazette, Legal Notice No 203 dated December 1, 2016, directing the 1<sup>st</sup> Respondent to deduct two percent (2%) from basic salaries of the Claimants and all other unionisable employees who are not members of the 2<sup>nd</sup> Respondent as agency fees accordingly.
  - c. that the CBA was registered by this Court under RCA 70 OF 2016, and the same expired on December 31, 2017, thereupon being divested of its legal effect.
  - d. that on November 12, 2018, another Collective Bargaining Agreement (CBA) was signed between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents covering a period of four (4) years (1<sup>st</sup> January 2018 to December 31, 2021).
  - e. that the 1<sup>st</sup> Interested Party has never issued an Order directing the deduction of agency fees in respect of the second CBA.
  - f. that the Claimants and all other unionisable employees who are not members of the 2<sup>nd</sup> Respondent are still being deducted monies from their salaries in the guise of agency fees despite the fact that the 1<sup>st</sup> interested party has not issued an order in terms of Section 49 of the Labour Relations Act 2007.
  - g. that the Claimants' suit is brought in accordance with Section 19 of the Employment Act, Sections 4 and 49 of the Labour Relations Act and Articles 10,41,47, and 50 of the Constitution of Kenya 2010.
3. The suit was filed together with an application under a Certificate of Urgency, the Claimants' Notice of Motion dated June 3, 2022 whereby the Claimants are seeking interlocutory orders of injunction restraining the 1<sup>st</sup> Respondent from deducting agency fee from the salaries of the Claimants and other unionisable employees of the 1<sup>st</sup> Respondent who are not members of the 2<sup>nd</sup> Respondent, suspension of such deductions in the interim and refund of all unauthorized deductions.



4. The application was placed before me in chambers under a certificate of urgency on June 16, 2022, but I declined to either certify the application as urgent or to grant any interim orders. I directed that the application be served in the usual manner and fixed the same for directions on June 30, 2022.
5. On June 30, 2022, Counsel for the 2<sup>nd</sup> Respondent informed the Court that a similar suit had earlier been filed in the Court's Registry at Nairobi, being ELRC, Case No E253 of 2022. I directed the Respondents and the Interested Parties herein to file their respective responses to the Claimants' application. The 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Interested Party however subsequently informed the Court that they were supporting the Claimants' said application and that they had filed replying affidavits in that regard.
6. Before the Court could fix a Ruling date on the Claimants' said application, the 2<sup>nd</sup> Respondent filed a Notice of Motion dated September 9, 2022 (filed on September 12, 2022) seeking orders:-
  - a. that the claim by the Claimants herein originated by a statement of claim dated June 3, 2022 be struck out.
  - b. that costs of the claim be paid by the Claimants to the 2<sup>nd</sup> Respondents.
7. On November 7, 2022, I issued directions that the 2<sup>nd</sup> Respondent's said Notice of Motion dated September 9, 2022 would be canvassed by way of written submissions, and directed parties herein to file and to exchange submissions thereon. On its part, the 1<sup>st</sup> Respondent indicated that it was not opposing the application.
8. The application before me for determination is therefore the 2<sup>nd</sup> Respondent's said Notice of Motion dated September 9, 2022, and prayers sought therein have been set out in paragraph 6 of this Ruling. The application sets out grounds upon which it is based as follows:-
  - a. the claim is sub-judice a pending claim in this Court at Nairobi in Milimani ELRC Case No E523/2022 against the 1<sup>st</sup> Respondent wherein the Claimants are parties under the 2<sup>nd</sup> Respondent or the 2<sup>nd</sup> Interested Party herein.
  - b. that interim orders were granted in Nairobi ELRC Case No 253 of 2022 pending hearing and determination of the claim over the same dispute involving similar parties.
  - c. that the reliefs sought in the claim herein and the interlocutory application in this claim are similar and competing with reliefs sought and interim orders granted in the pending suit in Nairobi, ELRC Case No E253/2022, over the same subject matter and dispute between the same parties herein.
  - d. that the instant claim and application is forum shopping which will not only prejudice, embarrass or cause absurdity (but lead to) parallel decisions by the same Court over the same dispute between the same parties by this Court sitting in Mombasa and Nairobi in this matter and in Nairobi ELRC Case No E253/2022.
  - e. that the suit by the Claimants is incompetent and otherwise an abuse of Court process; as the Claimants lack *locus standi* and legal capacity to represent unionisable employees within the 1<sup>st</sup> Respondent.
  - f. that the claim alleges representative suit yet lacks all or any of the requisite letters of authority from all unionisable employees of the 1<sup>st</sup> Respondent.
  - g. that the claim and proceedings herein are therefore vexatious, frivolous, scandalous and otherwise an abuse of Court process.



9. The application is supported by an affidavit of Moss K. Ndiema, the 2<sup>nd</sup> Respondent/Applicant's Secretary General, sworn on September 12, 2022. Documents annexed to the supporting affidavit include pleadings filed by the 2<sup>nd</sup> Respondent herein in Nairobi ELRC Case No E253/2022, and the Court's interim orders given on April 22, 2022. Other documents exhibited by the 2<sup>nd</sup> Respondent/Applicant include an affidavit sworn by the 1<sup>st</sup> Claimant herein (Gideon Mutua) on May 27, 2022 and filed in Nairobi ELRC Case No 253/2022, sworn on behalf of himself and on behalf of the unionisable employees of the Respondents. The Respondents in that case are shown to include the 1<sup>st</sup> Respondent herein (Bollere Transport Logistics Kenya Limited).
10. Other documents exhibited by the 2<sup>nd</sup> Respondent/Applicant herein include:-
  - a. a Recognition Agreement signed between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein on January 15, 2015.
  - b. Registration Certificate dated June 17, 2021 on a CBA between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  - c. a memorandum of claim filed in Nairobi ELRC Case No E253/2022.
11. The application is opposed by the Claimants and the 2<sup>nd</sup> Interested Party. The 2<sup>nd</sup> Interested Party filed a replying affidavit sworn by Omechi Ongera and filed on October 25, 2022 while the Claimants filed a replying affidavit sworn by Gideon Mutua (the 1<sup>st</sup> Claimant) and filed in Court on October 31, 2022.
12. It is clear, from the material placed before me, that the dispute in the suit herein and in Nairobi ELRC No E253/2022 is, but one, and revolves around the Recognition Agreement and Collective Bargaining Agreements signed between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, both of whom are parties in Nairobi ELRC Case No E253/2022, and the legality of deduction by the 1<sup>st</sup> Respondent herein of agency fees from the Claimants' salaries in favour of the 2<sup>nd</sup> Respondent, based on the Recognition and Collective Bargaining Agreements aforesaid.
13. I am satisfied that the Claimants are participants in Nairobi ELRC Case No E253/2022, which was filed in Court on April 21, 2022, and interim orders thereon given on April 22, 2022; and that aware of the foregoing facts, the Claimants filed the suit herein and an accompanying urgent application on June 16, 2022 and attempted to move the Court to give interim injunctive orders that would have competed with the interim orders which had already been given by the Court at Nairobi on April 22, 2022. This, in my view, is a deliberate abuse of the Court's process and an iniquity against the sanctity of judicial process.
14. In pleading the doctrine of sub-judice, the 2<sup>nd</sup> Respondent/Applicant invoked the provisions of Section 6 of the *Civil procedure Act* which provides:-

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed...”
15. The Court in *Kenya Bankers Association -vs- Kenya Revenue Authority* [2019] eKLR stated as follows:-
  - “ 34. For the doctrine of sub-judice to apply, the following principles ought to be present:-
    - a. There must exist two or more suits filed consecutively.



- b. The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same Court or any other Court having jurisdiction in Kenya to grant the relief claimed...

37 ....However, the principle of subjudice does not talk about the “prayer sought” but rather “the subject matter”...In the matter of Interim Independent Electoral Commission the Supreme Court cited with approval an Australian decision where it was held:-

“...we do not think that the word “matter” ... means legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion, there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court....

30 ....it is the substance of the claim that ought to be looked at rather than the prayers sought...”

16. I have gathered from the pleadings herein that Nairobi ELRC Case No 253/2022 was filed by the 2<sup>nd</sup> Respondent herein after the 1<sup>st</sup> Respondent threatened to revoke the Recognition Agreement signed between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein in 2015, and that revocation of the said agreement would have led to stoppage of deduction of agency fee from the Claimants’ salaries and those of other unionisable employees of the 1<sup>st</sup> Respondent in favour of the 2<sup>nd</sup> Respondent. In the present suit, the Claimants are seeking suspension and eventual stoppage of those deductions.
17. It is my finding that the matters in issue in the suit herein are directly and substantially in issue in Nairobi ELRC Case No 253/2022 which was filed prior to the suit herein, and in which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 2<sup>nd</sup> Interested Party herein are parties. The Claimants, herein who are unionisable employees of the 2<sup>nd</sup> Respondent herein, and over whom the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Interested Party trade unions appear to be competing, are active participants in the said suit as already stated in this Ruling.
18. It is my finding that the suit herein is sub-judice Nairobi ELRC Case No 253 of 2022 and cannot be entertained by this Court.
19. Further, whereas the Claimants have indicated in their Memorandum of claim herein that they are “suing on their behalf and on behalf of all non-union/non management staff of the 1<sup>st</sup> Respondent.,” they (the Claimants) have not furnished names and particulars of those other persons on behalf of whom they purport to sue, by filing a letter of authority signed by all those other persons pursuant to Rule 9(1) & (2) of the Employment and Labour Relations Court (Procedure Rules) 2016. Had a list of those other non-management staff been furnished and/or filed by the Claimants together with their suit documents, the Court would, possibly, have considered overlooking this requirement pursuant to the proviso to Rule 9 aforesaid. It is my finding that the Claimants’ suit is incompetent for want of names and particulars of the persons on whose behalf the Claimants purport to sue as well, and for want of a letter of authority from such persons.



20. I find and hold that the Claimant’s suit herein is *sub judice*, incompetent and therefore bad in law. The 2<sup>nd</sup> Respondent’s Notice of Motion dated September 9, 2022 is hereby allowed, and the suit is hereby dismissed with no order as to costs.

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> APRIL 2023**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....for Claimant

..... for Respondent

