



**Kenya Union of Journalists v Kenya Broadcasting Corporation & 3 others
(Petition E002 of 2022) [2023] KEELRC 1023 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1023 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E002 OF 2022**

JK GAKERI, J

MAY 2, 2023

BETWEEN

KENYA UNION OF JOURNALISTS PETITIONER

AND

KENYA BROADCASTING CORPORATION 1ST RESPONDENT

**THE CABINET SECRETARY, LABOUR AND SOCIAL
PROTECTION 2ND RESPONDENT**

COMMUNICATION WORKERS UNION (COWU) 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. What is before the court for determination is petition dated 5th January, 2022.
2. The Petitioner prays for the following reliefs:
 - a. A declaration that Legal Notice No. 146 published in the Kenya gazette Vol CXXXIII – No. 168 of 20th August, 2021 is unconstitutional, unlawful, unreasonable and untenable.
 - b. A declaration that the Legal Notice No. 146 published in the Kenya gazette Vol CXXXIII – No. 168 of 20th August 2021 by the 1st Respondent directing the 2nd Respondent to deduct 2% of affected unionisable employees’ basic salary and remit to the 3rd Respondent is a violation of Article 41 (1) (2) a, b, c and (5) of *the Constitution*.



- c. A declaration that the Legal Notice No. 146 published in the Kenya gazette Vol CXXXIII – No. 168 of 20th August 2021 violates Articles 27, 36, 10 and 232 of *the Constitution*.
 - d. A declaration that the actions of the Respondents up to the gazette of the legal Notice No. 146 of 20th August, 2021 contravened Article 2 of the ILO Right to Organize and Collective Bargaining Convention of 1949.
 - e. An order of prohibition to issue from this Court barring the 2nd Respondent from further implementation of the legal notice no. 146 of 20th August, 2021.
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- f. An order of certiorari to issue from this Honourable Court quashing the Legal Notice No. 146 published in the Kenya gazette Vol CXXXIII – No. 168 of 20th August 2021.
 - g. In the alternative to (e) above, an order of mandamus to issue from this Honourable Court compelling the 1st Respondent to revoke the Legal Notice No. 146 published in the Kenya gazette Vol CXXXIII – No. 168 of 20th August, 2021
 - h. Costs of this suit and interest thereon at court rates.
3. The 1st Petitioner is a duly registered trade union under the *Labour Relations Act* whose objectives include to obtain just and proper working conditions for its members, settlement of disputes arising out of employers and its member employees, conciliation, arbitration and generally safeguarding the interests of its members.
4. The 1st Respondent is the Cabinet Secretary of Labour and Social Protection and under the Administrative Authority the Act.



5. The 2nd Respondent is a state corporation established under Kenya Broadcasting Act with the primary mandate of providing public service broadcasting and is the employer of the interested parties who are members of the petitioner.
6. The 3rd Respondent is a trade union also operating within the communication industry.
7. The 4th Respondent is the Governments Principal Legal Advisor pursuant to Article 156 of [*the Constitution*](#) of Kenya, 2010.
8. The interested parties are the members of the petitioner and are employees of the 2nd Respondent.
9. The petitioner avers that on the 20th August 2021 the 1st Respondent published an order under Legal Notice no. 146 in the Kenya Gazette directing the 2nd Respondent to deduct 2% of salaries from all unionisable employees.
10. That pursuant to the order the 2nd Respondent sent out notices that it would affect the deduction of 2% Agency Fee together with Kshs.150/= to be paid to COTU from persons in the affected job groups who are beneficiaries of the bargaining agreement signed between the 2nd Respondent and 3rd Respondent.
11. The petitioner states that the order was founded on fraud and misrepresentation as the official records indicate that the petitioner has the largest number of members among the employees of the 2nd Respondent as per the audit conducted on the 6th August, 2013.
12. The petitioner further states that other than having the largest number of members among the employees the 2nd Respondent, the type of workers represented by the petitioner are professional journalists which is a distinct departure from the category represented by the 3rd Respondent.
13. The petitioner avers that the 2nd Respondent started frustrating it by refusing to cooperate in negotiating the terms of a collective agreement, that all the meetings planned for collective bargaining were cancelled by the 2nd Respondent.
14. The petitioner avers that it sought for intervention from the Labour Commissioner and two conciliators were appointed and it was agreed that parties meet at a date not later than 8th June 2014, that the petitioner forwarded the draft recognition agreement to the 2nd Respondent who failed to convene a meeting.
15. That in a bid to resolve the issue the petitioner proposed that parties explore demarcation of representation between the petitioner and the 3rd Respondent but the meetings never proceeded due to unavailability and unwillingness on the part of the 2nd Respondent.
16. The petitioner contends that the 2nd Respondent deliberately frustrated its efforts for with the intention of facilitating and aiding the execution of a collective bargaining agreement in favour of the 3rd Respondent which had satisfied the criteria for recognition.
17. The petitioner avers that unless an order is granted suspending or reversing the deductions the 2nd Respondent will continue deducting the interested parties' salaries causing hardship to them due to double deductions.
18. The petitioner avers that the Gazette Notice ordering the 2nd Respondent to deduct 2% union dues is unconstitutional, oppressive, unlawful and unreasonable and should be declared null and void.



1st Respondent's case

19. In response to the petition the 1st Respondent filed a Replying Affidavit sworn by Peter K. Tum, the Principal Secretary in the Ministry of Labour on the 7th February, 2022.
20. The affiant states that Section 49(1) of the *Labour Relations Act* mandates the 1st Respondent to gazette an Agency Fee in relation to unionisable employees who are benefiting from Collective Bargaining Agreement negotiated by a union other than their own.
21. The affiant averred that Agency fee is a matter laid down in law and could not be alleged to be a double deduction.
22. The affiant states the petitioner had never signed a Collective Bargaining Agreement with the 2nd Respondent hence the petitioner's members were liable to pay agency fees to the 3rd Respondent as per the provisions of Section 49 of the *Labour Relations Act* as they were benefiting from the 2016/2020 CBA negotiated by the 3rd Respondent.
23. The affiant states that upon receiving an application from the 3rd Respondent dated 5th April 2019, the ministry conducted due diligence and after satisfying itself that the 3rd Respondent had met the threshold a draft order was forwarded to the Attorney General for publication.
24. The affiant stated that it received a letter from the petitioner dated 10th January 2022 seeking suspension and revocation of the Legal Notice on grounds of fraud, misrepresentation and concealment of material facts but there was no evidence in support of the allegations.
25. He states that the said Legal Notice has not violated any constitutional provisions or infringed the rights of the petitioner or the interested parties.
26. The affiant further states that the Order of certiorari to quash Legal Notice No.146 of 2021 cannot issue as it offends the provision of Order 53 of the Civil Procedure Rules, 2010 given that the notice was issued more than six months before the commencement of these proceedings.
27. The affiant further stated that the petitioner has not demonstrated how its fundamental rights and freedoms in *the constitution* have been infringed.
28. The affiant further states that the petitioner lacks locus standi to commence the proceedings as the proceedings herein are purely matters of private law between employer and employee and the petitioner has not obtained formal recognition from the 2nd Respondent.
29. The affiant urges the court to uphold the legality of Legal Notice 146 of 29th June 2021 and dismiss the petition.

2nd Respondent's case

30. In response to the petition the 2nd Respondent filed a Replying Affidavit sworn by Dr. Naim Bilal on the 1st February 2022.
31. The affiant avers that the petition deals with the publication of Legal Notice 146 published in the Kenya Gazette Vol. CXXXIII- No. 168 of 20th August 2021, which the 2nd Respondent had no role therefore is wrongfully sued by the petitioner.
32. The affiant states that he was aware that the petitioner had filed another suit namely Industrial Cause No. 1142 of 2014 against the 2nd Respondent seeking declaratory orders to the effect that the petitioner has the simple majority members which suit was dismissed.



33. The affiant states that the interlocutory orders sought by the petitioner could be obtained without joining the 2nd Respondent in the dispute and urges the court to dismiss the petition with costs.

3rd Respondent's case

34. In response to the petition the 3rd Respondent filed a Replying Affidavit sworn by Benson Okwaro the General Secretary of the 3rd Respondent on the 24th January, 2022.
35. The affiant states that the 2nd Respondent and the 3rd Respondent entered into recognition agreement dated 13th February, 2013 and a Collective Bargaining Agreement on 3rd August, 2017 duly registered in court.
36. The affiant states that the petitioner filed a suit Industrial Cause Number 1142 of 2014 against the 2nd and 3rd respondent seeking to challenge the recognition agreement but the same was dismissed for want of prosecution.
37. The affiant further states that the petitioner had not demonstrated to the court its compliance with the mandatory provision of Sections 48 and 49 of the Labour Relations Act nor tendered any evidence demonstrating it had the largest membership among the 2nd Respondents staff.
38. The affiant further states that the petitioner had not demonstrated the manner in which the ministerial order under the Gazette Notice is illegal, treacherous, fraudulent and amounts to concealment.
39. The affiant further states that the petitioner does not have a recognition agreement with the 2nd Respondent nor a Collective Bargaining Agreement to entitle it to receive union dues from the 2nd Respondents employees.
40. The affiant contends that the prayers sought by the petitioner are legally untenable in the absence of a collective bargaining agreement and urges the court to dismiss the petition with costs.

Petitioner's submissions

41. The petitioner's counsel highlighted the following issues for determination;
- i. Whether the Petitioner has a right to enter into a recognition agreement and collective bargaining agreement with the 2nd Respondent?
 - ii. Whether the CBA between the 2nd and the 3rd Respondents is marred with improprieties of fraud, concealment and misrepresentation, and the effect thereof?
 - iii. Whether the order published under Legal Notice No. 146 in the Kenya Gazette Vol. CXXXIII-No. Violates the Constitutional rights of the Petitioner and the Interested Parties?
 - iv. Whether the order published under Legal Notice No. 146 in the Kenya Gazette Vol. CXXXIII-No. 168 is unconstitutional and unlawful and thus should be declared null and void?
 - v. What remedies should this Honourable Court grant in the circumstances?
 - vi. Who should bear the costs of this Petition?



42. On the first issue the petitioner submitted that Article 41(5) of *the Constitution* was unequivocal that every trade union, every employer's organization and employer has a right to engage in collective bargaining. Further, Section 54(1) of the *Labour Relations Act*, 2007 provides that an employer shall recognize a trade union for purposes of collective bargain if the union has a simple majority of the employees.
43. The petitioner submitted that its quest for recognition started in 2012 and vide letter dated 13th August 2012 confirming that it had majority membership. Further, that a joint membership audit conducted by the 2nd Respondent revealed that the petitioner had the highest number of members and that no other audit had been conducted after that.
44. The petitioner submitted that it was different from the 3rd Respondent in mandate and objectives and holds a right to be recognized and proceed with a collective bargaining under principle of demarcation.
45. The petitioner relies on the holding in Kenya Hotel and Allied Workers union vs Sunset Hotel Ltd (2017) eKLR.
46. On the 2nd issue the petitioner submitted that it was the dominant union compared with the 3rd Respondent as per the membership audit conducted on 6th August 2013 and that the 2nd Respondent deliberately frustrated its efforts for recognition by failing to convene a meeting to discuss the draft Recognition Agreement and by their unavailability to attend conciliation meetings thus aiding the execution of CBA in favour of the 3rd Respondent.
47. The petitioner submitted that it highlighted the impropriety of the CBA with the 3rd Respondent but the same was deliberately ignored as such the same is tarnished with fraud, concealment, misrepresentation and should therefore be declared null and void.
48. On the third issue the petitioner submitted that the interested parties were strangers to the 3rd Respondent and they did not know of its constitution therefore violates their freedom of Association as enshrined in Article 36(1), 31(2) of *the Constitution* of Kenya and Section 4 of the *Labour Relations Act*, 2007.
49. Further, that it curtails the freedom of the interested parties to join and participate in activities of trade unions as provided under Article 2 of the ILO Rights to Organize and Collective Bargaining Convention, 1949.
50. It submitted that the interested parties had not given any mandate to the 3rd Respondent express or implied to negotiate terms and conditions of their employment therefore it lacked competence and locus to negotiate a CBA on their behalf.
51. On the 5th issue the Petitioner submitted that the published Legal Notice 146 directing the 2nd Respondent to deduct 2% of salaries to all unionisable employees benefitting from the terms of the CBA is not only unconstitutional but void as it violates the provision of Article 36 of *the Constitution*.
52. The petitioner submitted that 2% Agency Fee deductions of interested parties and subsequent remittance to 3rd Respondent amounted to double deduction as there is already a deduction to the petitioner on a monthly basis.
53. The petitioner submitted that there were no benefits accrued to the interested parties and thus the 2% deduction will occasion liability and no gain which amounts to violation of Article 41 of *the Constitution* of Kenya, 2010.
54. Finally, the petitioner urged the court to rule in its favour having proved and grant costs.



3rd Respondent's Submissions

55. The 3rd Respondent, in its submissions distilled four issues for determination as follows;
- i. Whether the 3rd Respondents membership constitutes the simple majority of unionisable employees of the 2nd Respondent.
 - ii. Whether the Recognition agreement and the collective bargaining agreement were concluded fairly, procedurally and in compliance with the law.
 - iii. Whether the petitioner has locus standi to represent the interested parties in absence of a Recognition Agreement between itself and the 2nd Respondent.
 - iv. Whether the 2% deduction of the interested parties salary on account of agency fee for 3rd Respondent was unconstitutional, unlawful and oppressive as alleged by the petitioner.
 - v. Whether the petition herein has basis in law or at all for the grant of the orders and/or reliefs sought on the face of the petition dated 5th January, 2022.
56. On the first issue, the 3rd Respondent submitted that in its Replying Affidavit it has tendered documents in support that it had the majority membership of unionisable employees of the 2nd Respondent placing it eligible for recognition purposes.
57. The 3rd Respondent submitted that it entered into a recognition agreement with the 2nd Respondent on the 13th February 2012 and a Collective Bargaining Agreement on 3rd August 2017. That the petitioner in a bid to challenge the recognition reported the dispute to the Minister pursuant to Section 62 of the Labour Relations Act but the petitioner and the 2nd Respondent were unable to settle their dispute through conciliation. The petitioner filed a suit in court in accordance with section 73 and 74 of the Labour Relations Act which matter was dismissed.
58. The 3rd Respondent submitted that the recognition agreement together with the Collective Bargaining Agreement were not marred with malice, bad faith or alleged fraud.
59. On the 2nd issue the 3rd Respondent submitted that a Recognition Agreement was a primal in any relationship between a trade union and an employer and the petitioner lacked the same and therefore has no locus in any trade dispute between itself and the 2nd Respondent.
60. Reliance was made on the holding in *Communication Workers Union vs Safaricom Ltd (2014) eKLR* and *Kenya Union of Employees of Voluntary and charitable organization (KUEVACA) vs Board of Governors & Maina Wanjigi Secondary School (2015) eKLR*.
61. On the forth issue the 3rd Respondent submitted that the 2% agency fee deduction is lawful and the 2nd Respondent was directed by the Minister to make the deductions pursuant to Section 49(3) of the Labour Relations Act, 2007.



62. Reliance was made on the holding in *KHAWU v Attorney General & 6 others* to urge that it was a lawful charge which did not violate any rights or freedoms guaranteed to employees under *the constitution*. In that case, the court stated that;
- “Section 48 and 49 are not mutually exclusive. One is payment of union dues by members of a trade union and the other for payment of Agency Fees by non-members benefitting from a union CBA . . .”
63. The 3rd respondent submitted that Legal Notice 146 was therefore in compliance with Section 49 of the *Labour Relations Act*.
64. On the final issue the 3rd Respondent submitted that there was no proper cause of action before the court to warrant the grant of the orders sought by the petitioner and the suit lacked merit and urged the court to stop the petitioner from continued abuse of the process of court.

Issues for determination

65. The issues that commend themselves for determination are:
- a. Whether the 1st petitioner has locus standi?
 - b. Whether the Petitioner’s constitutional rights have been violated by publishing of the Legal Notice 146 in the Kenya Gazette Vol CXXXIII- No 168?
 - c. Whether the petitioner is entitled to the orders sought?
66. As to whether the 1st Petitioner has standing to commence these proceedings, the court proceeds as follows;
- According to Black’s Law Dictionary 10th Edition, 2014, Standing means;
- “A party’s right to make allegation or seek judicial enforcement of duty or right.”
67. The 3rd Respondent in his response to the petition contended that the petitioner lacks locus standi for lack of a recognition agreement with the 2nd Respondent and relied in the holding in *Communications workers Union vs Safaricom limited* where the court held
- “The question here with regard to Locus Standi is that the claimant union has no recognition with the Respondent and even where such recognition is lacking there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union even where registered as such becomes a bystander waiting by the roadside for instructions.”
68. In its petition, the Petitioner has stated that pursuant to a Membership Audit conducted on the 6th August, 2013, it had majority membership and has since tried to obtain a recognition from the 2nd Respondent and as such had the locus to initiate the petition.
69. The petitioner has not attached the alleged Audit report to the petition but has confirmed that there is no existing recognition agreement between itself and the 2nd Respondent.
70. In *Law society of Kenya vs Commissioner of Lands and Others*, the court held that the test of Locus Standi to be met a party must have a sufficiency which would take the form of recognition of the trade



union by the employer so that the trade union may be able to represent those employees that form part of the union should any dispute arise”.

71. More significantly, Section 54(1) of the [Labour Relations Act](#) obligates an employer to recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees. Evidently, a recognition agreement is only essential for purposes of collective bargaining as opposed to any other purposes such as the right of a trade union to sue on behalf of its members which is grounded on membership. In the courts view, the provisions of Section 54(1) of the [Labour Relations Act](#) do not prevent a trade union from instituting a suit on behalf of its members as is the case here.
72. Thus, a trade union has the right to sue on behalf of its members as of right as ordained by the provisions of Section 22 of the [Employment and Labour Relations Court Act](#), 2011. A recognition agreement is an agreement between the trade union and the employer and the basis on which the two engage on the terms and conditions of employees of the members of the trade union. “It is not the basis upon which the trade union represents its members in court.” (See *Modern Soap Factory V Kenya Shoe and Leather Workers Union* (2020) eKLR.
73. The court is satisfied that the Petitioner had the requisite locus standi to file the petition.
74. The petitioner avers that it had on several occasions tried to enter into a recognition agreement with the 2nd Respondent after satisfying the simple majority membership following the membership Audit conducted on the 6th August 2013 but the same was not successful. That it deployed several measures such as conciliation pursuant to provisions of Section 65 of the [Labour Relations Act](#) and also filed a legal suit Cause No.1142 of 2014 that was later dismissed.
75. The 3rd Respondent on the other hand stated that it entered into a recognition agreement with the 2nd Respondent on the 13th February 2012 and later negotiated a Collective Bargaining Agreement registered by the court on the 20th March, 2018 which documents were adduced as evidence.
76. The 1st Respondent stated that pursuant to the provisions of Section 49 of the [Labour Relations Act](#), 2007 it gazetted and issued an agency fee order in the Kenya Gazette in respect of Unionisable employees who are benefitting from the CBA negotiated by another union other than their own
77. The 1st Respondent stated that upon receipt of a request to gazette the order, it conducted its due diligence and confirmed that the 3rd Respondent had met the legal threshold for issuance of an Agency Fee which led to publishing of the Gazette Notice as the employees of the 2nd Respondent had been benefitting from the 2016/2020 CBA negotiated by the 3rd Respondent.
78. The justification for this is in Section 49 of the [Labour Relations Act](#), 2007 which mandates the Minister to publish a Gazette Notice on deduction of Agency Fees from wages of employees covered by the Collective Agreement and who are not members of the trade union. Deduction of Agency Fee by an employer is lawful after the Minister’s order is issued as was held in *Kenya Aviation Workers Union V Bollore Africa Logistics* (2016) eKLR.
79. In contradistinction, Section 48 of the [Labour Relations Act](#), 2007 relates to “trade union dues” which is regular subscription payable to a trade union by a member for purpose of membership.
80. It requires no gainsaying that Agency fee is different from union dues. While the former relates to a non-member of a trade union benefitting from a Collective Bargaining Agreement between a trade union and an employer, the latter is payable by members of a particular trade union for purposes of membership.



81. As regards Agency Fee in Kenya Hotel and Allied workers vs Attorney General & 6 others, the court held as follows;
- “I find that payment of agency fee does not interfere with freedom of association nor does it limit the right to freedom of association . . .”
82. Worthy of note, as this is a Constitutional Petition premised on alleged violations of various articles of *the Constitution* of Kenya, 2010, it is essential to establish if constitutional rights have been violated as enunciated in Anarita Karimi Njeru V Republic (Supra), where Trevelyn and Hancox JJ stated as follows;
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
83. The petitioner states that by publication of the of Legal Notice 146 in the Kenya Gazette Vol CXXXIII the following Articles in *the Constitution* of Kenya, 2010 were violated 19, 232, 27, 36, 41(1)(2)a and b, 47, 232, 50, 54 and 57.
84. Whereas the various articles of *the Constitution* are clearly articulated, the manner and extent of violation has not been demonstrated.
85. The court is satisfied that the test in Anarita’s case has not been met.
86. Finally as regards Agency Fees, the 3rd Respondent established that it had a recognition agreement and a Collective Bargaining Agreement in place which was benefitting unionisable employees of the 2nd Respondent.
87. Relatedly, since the 1st Respondent published Legal Notice 146 in accordance with the provisions of Section 48 (2) of the *Labour Relations Act*, 2007, after the 3rd Respondent satisfied the legal requirements, the 1st Respondent had the mandate to deduct Agency Fee.
88. The deduction of the 2% agency fee on the interested parties is consistent with the provisions of Section 49(1) of the *Labour Relations Act* which allows deductions from employees who are not members of the union but are beneficiaries of the terms of the Collective bargaining agreement.
89. Section 49(1) of the *Labour Relations Act* provides that
- (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.
90. Since the Petitioner has not furnished evidence of the alleged fraud and misrepresentation or demonstrate its members were not benefiting from the Collective Agreement between the 1st and 3rd Respondent, its members are by law required to pay Agency Fee to the 3rd Respondent until it negotiates a Collective Agreement with the 1st Respondent in which case any Agency Fee payable would



be paid to the Petitioner as long as members of the 3rd Respondent would be benefiting from the Collective Bargaining Agreement (CBA).

91. Significantly, under Section 59 of the *Labour Relations Act*, 2007, once a CBA is registered by the court, it becomes effective from the date agreed upon by the parties and enforceable.
92. Similarly, it becomes part of the contract of employment of those covered by it. Its terms are incorporated in the contracts of employment and its benefits are enjoined even after its effluxion.
93. This position was emphasized by the South African Labour Court in *Samwa City of Tshwane and Municipal City of Tshwane Case No. J877/13* as follows;

“It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees’ contract of employment . . .”

94. The sentiments of *Onyango J. in Union of Kenya Civil Servants V Kenya Medical Research Institute & another (2022) eKLR* are also instructive;

“The CBA between the 1st Respondent and the 2nd Respondent has been registered, incorporated into the contract of the 1st Respondent’s employees contracts therefore they are liable to pay agency fee as provided under Section 49 of the *Labour Relations Act* for as long as they are not members of the 2nd Respondent and are benefiting from the terms of its CBA.”

95. The court is in agreement with these sentiments.
96. Finally, the alleged hardship occasioned on account of double deductions of interested parties salaries was not proved and even if it was, there still would be no double deductions as the provisions of Sections 48 and 49 of the *Labour Relations Act* provide for payment of union dues and Agency Fee respectively, which are distinguishable as demonstrated above.
97. This position finds support in *Amalgamated Union of Kenya Metal Workers V Unity Auto Garage (NRB) Ltd (2014) eKLR*, where the court relied on *Tailor and Textile Workers Union V New Wide Garments Kenya (EPZ) Ltd* and stated as follows;

“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 contributions towards the costs which the representative trade union incurs in connection with its collective bargaining work. If they do not pay, that is unfair, members of the representative pay for those costs. An agency fees seek 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 work place to which they pay union dues does not turn them into paying riders. They remain free riders as they



make no contribution towards the collective bargaining costs of the representative union.”

98. The court expressed similar sentiments in *Kenya Hotels and Allied Workers Union V Attorney General & 6 others* (2015) eKLR as follows;

“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 constitutes 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 membership of a union that is not the one recognized for negotiation purposes, he would pay a little extra in the form of agency fees 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 . . .”

99. Looking at the law as expressed above, it is clear that payment of Agency Fees by non-members of the representative union is neither unconstitutional or unlawful nor oppressive. It is the cost non-members of a union have to meet for benefiting from the efforts and expenses of the representative trade union.
100. In the end, it is the finding of the court that the Petitioner has neither demonstrated that Legal Notice No. 146 published in the Kenya Gazette Vol. CXXXIII – No. 168 of 20th August, 2021 was procured through fraud or misrepresentation or was unconstitutional nor that it violated the rights of its members or was oppressive.
101. Consequently, the Petition herein is without merit and is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF MAY 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.

