



Kenya Union of Commercial Food and Allied Workers v Woolmatt Limited (Employment and Labour Relations Cause E033 of 2023) [2023] KEELRC 3375 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3375 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E033 OF 2023**

**HS WASILWA, J
DECEMBER 20, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

WOOLMATT LIMITED RESPONDENT

RULING

1. Before this Court for determination, is the claimant/ applicant’s Notice of Motion dated July 18, 2023, filed pursuant to section 12 of the *Employment and Labour Relations Court Act*, 2016, section 49 of the *Labour Relations Act*, 2007 and rule 17 of the *Employment & Labour Relations Court (Procedure) Rules 2016*, seeking for the following Orders; -
 1. Spent.
 2. That the honourable court do issue interim orders directing the respondent to commence deduction and remittance of agency fees from unionisable employees who are not members of the applicant pending hearing and determination of the application.
 3. That the honourable court do issue interim orders directing the respondent to comply with the *Legal Notice No. 112* issued on May 26, 2022 by the Cabinet Secretary for Labour.
 4. That the honorable court do issue orders directing the respondent to effect deduction and remittance of agency fees from all unionisable employees who are not members of the claimant/applicant.
 5. That costs be in the cause.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Mike O. Oranga, the applicant’s National Organizing Secretary, sworn on July 18, 2023.



3. The deponent stated that the parties herein have a valid recognition agreement and have negotiated a collective bargaining agreement which is in force and the review and amendment of the said Collective Bargaining Agreement is a matter before the Court in Nakuru ELRC Cause No. E008 of 2020.
4. He stated that pursuant to the said Collective Bargaining Agreement both members of the Applicant and non-members have been enjoying better terms and conditions arising therein. However, that only the members of the Applicant have been paying monthly union subscriptions while other unionisable employees who are not members but beneficiaries of the CBA continue to enjoy better working terms and conditions without paying any subscription fees.
5. He avers that as per the provision of the *Labour Relations Act, 2007* the applicant made a request to the Cabinet Secretary Ministry of Labour on March 10, 2022, seeking an order requiring the respondent to deduct and remit agency fees from all unionisable employees.
6. In response, the Cabinet Secretary issued an order on May 26, 2022 directing the respondent to commence the deduction of agency fee and the same was gazetted on May 26, 2022 under Legal Notice No. 112.
7. Subsequently, the applicant served the said order to the respondent on September 1, 2022 and further wrote to them requesting implementation of the order.
8. The affiant stated that the respondent has approximately 122 unionisable employees who are not members of the applicant and the respondent has failed and refused to implement the order by effecting deduction and remittance of agency fees.
9. He states that the respondent's obstinate behavior is aimed at denying the applicant its lawful dues and sabotaging its activities. Furthermore, that the respondent has been victimizing and intimidating employees to withdraw their membership to debilitate the activities of the Applicant by denying them members monthly subscriptions.
10. He contends that the respondent lacks any justifiable reason why they have failed to implement the order issued by the Cabinet Secretary Ministry of Labour.
11. The applicant thus prayed for the application to be allowed as prayed as the directive is long overdue.
12. The application is opposed by the respondent who filed a replying affidavit sworn on the September 18, 2023 by Mineshkumar Goshrani, the Director of the respondent.
13. The affiant stated that the application is incompetent, misconceived, an abuse of the court process, brought in bad faith and it ought to be dismissed with costs.
14. He stated that the prayers sought in the said Application are not only ambiguous but are also untenable in law. Further, that the said Application is misleading this Honourable Court both in facts and in law and it ought not be entertained by this Court at all.
15. He stated that *Legal Notice Legal Notice No. 112* issued on May 26, 2022 is overtaken by events as it is premised on a Collective Bargaining Agreement which expired on April 30, 2019.
16. He stated that upon receipt of the said Legal Notice on September 27, 2022, he issued an internal memo to their Central, West and East Branches informing all unionisable employees the import of the said legal Notice and informing them that they shall deduct agency fees as stipulated in the said Legal Notice.



17. On September 28, 2022, they received a verbal request from Branch Managers from their Central, West and East Branch to convene a meeting to elaborate further the aforesaid internal memo dated September 27, 2022 and the Legal Notice terms.
18. Subsequently, on September 29, 2022, they convened a meeting whose sole agenda was to elaborate the content of the internal memo dated September 27, 2022 as captioned under minute 2/09/2023.
19. That it is on that meeting that the employee's representatives expressed strongly that the employees were not amenable to deduction of agency fees and they directed the management to put on hold the deduction of the Agency fee since they were not willing to be represented by the Union anymore.
20. That on September 30, 2022, they received a letter captioned "withdrawal of membership from the Union" from their employees where the employees stated inter alia, that; "...we wish to express our interest in dealing with our issues as Woolmatt Limited fraternity direct with our management and directors without any interference from the said Union and the employees attached a duly signed list of employees withdrawing their membership from the Union".
21. He stated that the said letter was copied upon the claimant and the County Labour Officer, therefore that he claimant was aware of the withdrawal of employees from its Union.
22. He stated that on May 8, 2023 during the Collective Bargaining Agreement negotiations before the County Labour Officer, the said letter was submitted, which letter was duly received and stamped. Further that they received a duly signed list of employees from their Central, West and East Branches whereof they reaffirmed that their decision to withdraw their membership from the claimant was done without coercion.
23. That since the employees withdrew their membership from the claimant, they formed an Employee Welfare Association, which associations has engaged the respondent's leadership on various issues inter alia, emergency salary advance, small soft loans, overtime hours, off duty days, personal growth, social welfare allowable absent days, resignation notice, uniforms and salaries.
24. From the foregoing, it is crystal clear that the employees do not recognize the claimant and they do not want to be associated with it in any way, thus compelling the respondent to deduct the agency fee would be punitive to the Employees and it is tantamount to unfair labour practice.
25. The affiant stated that its employees have a right to association and disassociate and to choose their representation and thus, this Court should protect their rights.
26. He stated that the allegations that the respondent has been victimizing and intimidating employees to withdraw their membership from the claimant is hot air. In any event that no evidence has been tendered to support these allegations.
27. The deponent stated that on June 27, 2023, they lodged an Application before the National Labour Board to revoke the Recognition Agreement between it and the claimant dated November 3, 2016 which led to the Collective Bargaining Agreement (2017-2019) upon which the agency fee is pegged thus the instant application is only aimed to vex them and the Board that is yet to give its verdict.
28. To expedite on the revocation of the Recognition Agreement, the respondent wrote a reminder on September 6, 2023, to the National Labour Board requesting for an update on the status of the Application.
29. He avers that they believe their application for revocation is merited because the claimant now has only 1 member out of a work force of 122 Employees, as admitted in their Application, thus they fall short



- of the simple majority threshold as required by the Law. In any case that agency fees should be paid for unionisable members who are benefitting from the terms of the Collective Bargaining Agreement.
30. Also that the strength of the claimant should lie on voluntary membership and not on compulsory agency fees charged on non-members.
 31. He stated that from the circumstances of this case, it is evident that the relationship between the claimant and the employees has irretrievably broken down and therefore the instant Application is a gross abuse of the Court process to the extent that it seeks to force employees to stay in a relationship they disowned.
 32. In view of the foregoing, the affiant stated that the claimant has not given any plausible reason why this Court should interfere with the status quo awaiting the hearing and determination of the Application before the National Labour Board dated June 27, 2023 to terminate/revoke the Recognition Agreement dated November 3, 2016.
 33. Based on the foregoing, the affiant state that the application is not only a gross abuse of the Court process but also vexatious, frivolous and scandalous and it ought to be dismissed.
 34. Directions were taken for the Application to be canvassed by written submissions with the Applicant filling on October 18, 2023 and the respondent filed on October 19, 2023.

Applicant's Submissions.

35. The Applicant submitted that it made a request to the Cabinet Secretary, Ministry of Labour seeking an order requiring and authorizing the respondent to deduct agency fees from all unionisable employees who enjoy better terms and conditions of service arising from the CBA. Which the Cabinet Secretary allowed and gazzeted it *vide* [Legal Notice No. 112](#) but that the respondent has refused to implement this directive.
36. He argued that the applicant has proved that it deserves payment of Agency fees following the issuance of the Gazette Notice aforementioned as all unionisable employees of the respondent have been benefitting from the 2017-2019 CBA.
37. To support its Application, the Applicant stated that section 49 of the [Labour Relations Act](#), 2007 mandates the Minister to publish a Gazette Notice authorizing deduction and remittance of Agency Fees from wages of employees covered by the Collective Agreement who are not subscribing members of the Trade Union. Thus the directive for the deduction of Agency fees by an employer is lawful as was held in [Kenya Aviation Workers Union v Bollore Africa Logistics](#) [2016] eKLR, where the Court held that;

“Section 49(1) of the [Labour Relations Act](#), provides that 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 & member of the trade union.”

38. It was submitted that in Nairobi Petition No. E002 of 2022, Justice Dr. Jacob Gakeri, held that;

“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”.

39. It is the Applicant’s Submissions, that section 59 of the [Labour Relations Act](#), 2007, provides that once a CBA is registered by the court, it becomes effective from the date agreed upon by the parties and enforceable and becomes part of the contract of employment of those covered by it. That the terms are incorporated in the contracts of employment and its benefits are enjoined even after expiry date of the CBA. This he argued, is captured at clause 27 of the CBA and reinforced by the South African Labour Court in the case of [Samwa City of Tshwane and Municipal City of Tshwane](#) Case No. J877/13, where the Court held that; -

“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 ...”

40. The Applicant relied also on the case of [Union of Kenya Civil Servants v Kenya Medical Research Institute & another](#) [2022] eKLR, where Maureen Onyango J stated that:

“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 members of the 2nd respondent and are benefiting from the terms of its CBA.”

41. The Applicant also cited the case of [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 union 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’s 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.”

42. Finally, they Union, cited the case of [Kenya Hotels and Allied Workers Union v Attorney General & 6 others](#) [2015] eKLR. where it was stated 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 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...”

43. Based on the case laws cited and analysis of the law, the Applicant urged this Court to allow its Application with costs.

respondent’s Submissions.

44. The respondent submitted on two issues; whether the claimant is entitled to the reliefs sought and who should bear the costs of the Application.

45. On the first issue, the respondent cited the case of Rift Valley Railway Workers Union v Rift Valley Railways Kenya Limited and another [2014] eKLR, where the Court held that

“Agency fees is allowed under section 49(1) of the Labour Relations Act as against unionisable employees who are not members of the union but are, benefitting from a Collective Bargaining Agreement negotiated by the Union on behalf of its members”

46. Accordingly, that section 49(1) of the Labour Relations Act presupposed that the negotiated terms must cover and benefit non-members, therefore that it is incumbent on the Applicant to prove that the respondent’s unionisable employees, who are not its members are benefitting from terms negotiated by them. A burden that the Applicant has not met because it has failed to tender any evidence of how the respondent’s unionisable employees are benefitting from the terms negotiated by them.

47. The respondent submitted that even though its employees have withdrawn their membership from the Union, they have formed an employee’s welfare association that has engaged it on diverse issues and negotiated and got better terms *inter alia*, emergency salary advances, small soft loans, overtime hours, off duty days, personal growth, social welfare, allowable absent days, resignation notice, uniforms and salaries, benefits that were not available under the Collective Bargaining Agreement negotiated by the claimant, thus the employees welfare is duly taken care of.

48. The respondent submitted also that its employees have a right to association and dissociate and to choose their representation as a fundamental right enshrined under article 36(2) of the Constitution, which they urged this Court to uphold and protect. To support their view, they relied on the case of Kenya Union of Entertainment and Music Industry Employees v Bomas of Kenya Limited [2017] eKLR where the Court was of the view that;

“forcing payment of union dues from a member who has moved on to another union, fetter their freedom of association while at the same time amounts to double payments to the detriment of the member.”

49. It was submitted further that the respondent’s employees have been able to demonstrate that they are able to negotiate for different and better terms as compared to the terms the claimant, thus it would be unfair and against the rules of natural justice to subject these employees to deduction of agency fees which they are strongly opposed to. In any event that they lodged an Application before the National Labour Board to revoke the Recognition Agreement between the claimant and the respondent, which



application is merited since the claimant has only 1 member out of a work force of 122 thus they fall short of the simple majority threshold as required by the Law.

50. To support their argument, the respondent relied on the case of *Kenya Hotels and Allied Workers Union v. Attorney General & 6 others* [2015] eKLR where Justice Ndolo (dissenting) held that;

“...the strength of the claimant should lie on voluntary membership and not on compulsory agency fees charged on non-members”.

51. Moreover, it was argued that the claimant has not demonstrated that this orders are warranted at the interlocutory stage. In this they relied on the case of *Kenya Union of Special Needs Education Teachers v Teachers Service Commission* [2019] eKLR where this Court held that

“This Court notes that the orders sought in the application are the same ones sought in the main claim. In the circumstances, resolving this application will determine the main claim. I therefore issue no orders in the interim and direct that Parties proceed with the main Claim.”

52. On whether the respondent should be compelled to comply with Legal Notice No. 112 issued on May 26, 2022, the respondent submitted that after receiving the Notice and sending to all employees and further explaining its import, the Employees representatives strong expressed their position, that they are not amenable to deduction of the said agency fees and in effect withdrew, their membership from the Union, therefore upon the withdrawal from the Union, it was impossible to comply with the legal Notice.

53. On costs of the Application, the respondent submitted that it is trite law that Costs follow the event and being that the claimant has failed to demonstrate to this Court that it is entitled to the prayers sought in its Application, the Application is not only a gross abuse of the Court process but also mischievous, vexatious, scandalous and it ought to be dismissed with costs to the respondent.

54. I have examined the averments and submissions of the parties herein. The issue before me does not concern payment of union dues but payment of agency fees which is provided for under section 49 of the *Labour Relations Act* which provides as follows;

“ 49. Deduction of agency fees from unionisable employees covered by collective agreements

- (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 subsection (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.
- (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.
- (4) The Minister may vary an order issued under this section on application by the trade union and the employer, group of employers or employers' organisation concerned.
- (5) A member of a trade union covered by a collective agreement contemplated by subsection (1) who resigns from the union, is immediately liable to have an agency fee deducted from his wages in accordance with this section.
- (6) If a collective agreement is implemented retrospectively after registration by the Industrial Court, the agency fee shall be deducted and paid to the trade union for the period of retrospective implementation in accordance with this section."

55. The applicant already made their request to the Minister for labour to allow deduction of agency fees, which request was allowed through gazettment of the same as exhibited herein.
56. The employees need not be members of the union so long as they are benefitting from what was negotiated by the Union, then they are obligated to pay agency fees.
57. Under section 49 (3) above the respondent is obligated to deduct and remit agency fees within 30 days of receiving the minister's notice.
58. I therefore find the application merited and allow it and direct the deduction and remittance of agency fees by the respondents for the unionisable employees benefitting from the CBA negotiated pending the hearing and determination of this claim.
59. The respondent is therefore directed to comply with legal notice No. 112 issued on May 26, 2022 by the Cabinet Secretary for Labour.
60. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Tacko for Claimant – present



Kairu for respondent – present

