



**Banking Insurance and Finance Union v Paramount Universal Bank Kenya Ltd  
(Cause E108 of 2022) [2023] KEELRC 3191 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3191 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E108 OF 2022  
NJ ABUODHA, J  
DECEMBER 5, 2023**

**BETWEEN  
BANKING INSURANCE AND FINANCE UNION ..... CLAIMANT  
AND  
PARAMOUNT UNIVERSAL BANK KENYA LTD ..... RESPONDENT**

**RULING**

1. The Claimant a registered trade union filed its amended statement of claim dated 14<sup>th</sup> November, 2022 pleaded inter alia as follows: -
  - a. The Claimant averred that it has entered in to a recognition agreement with Kenya Bankers Association and the Respondent is a member of the said association.
  - b. The Claimant averred that as a result of the Recognition Agreement, the Claimant union and Kenya Bankers Association have entered in to several collective agreement negotiations the last relevant CBA to this dispute was signed on 19<sup>th</sup> August,2021. The Unionisable employees are captured in the preamble of the parties CBA. The Terms and conditions of service have all been summed up in the parties CBA.
  - c. The Claimant averred that the parties obtained a judgment dated 8<sup>th</sup> April,2021 where the court observed that the Claimant union was entitled to agency fees from all unionisable employees of the Respondent who were not members of the bank.
  - d. The Claimant averred that through a letter dated 11<sup>th</sup> August,2011 which was served and received by the Respondent- requested the Respondent to supply



to it a list of unionisable employees in its employment and also a list of the companies it has outsourced its unionisable employees from.

- e. The Claimant further averred that the Respondent did not respond to the letter from the Claimant and it did not also supply the Claimant applicant with the list of unionisable employees as requested of it by the Claimant union.
- f. The Claimant submitted that it has entered in to several collective Bargaining Agreements negotiations on the terms and conditions of employment for all the unionisable bank employees who captured in the preamble clause of the parties CBA.
- g. The Claimant submitted that section 49(2) b of the *Labour Relations Act* mandates the employer of unionisable employees of trade union to supply a list of all unionisable employees in respect of whom agency fees shall be deducted to the said trade union.
- h. The Claimant submitted that in addition to the Minister for issuance of an order for agency fees the said request should be accompanied with list of unionisable employees prepared by the employer which it has refused to supply to the Claimant. It was therefore impossible for the Claimant to obtain an order for agency fees from the minister.
- i. The Claimant submitted that the Respondent continues to violate the parties agreement with impunity. That the union plays a fundamental role in securing employees gains with regard to negotiated agreements which benefits not only the union members but go beyond the union membership to pother unionisable employees who are not members of the union. Its fair that employees who are not members of the union make contributions towards the costs which the representative union incurs in connection with CBA work. Agency fees seeks to make them pay without compelling them to join the representative trade union.
- j. The Claimant finally averred those actions of the Respondent amount to unfair labour practice.

2. The Claimant in the upshot prayed for the following against the Respondent;

- a. The court be pleased to declare that the Claimant is entitled to be supplied with list of unionisable employees.
- b. Costs of the claim.

3. The Respondent in reply filed its statement of Response dated January 17, 2023 and averred that this court lacks requisite jurisdiction to hear and determine the suit herein as the same is res-judicata. The matter was directly and substantially in issue with Nairobi ELRC Cause No. 2191 of 2016 between same parties where Hon. Onesmus Makau rendered a judgment on 8<sup>th</sup> April,2021.

4. The Respondent averred that in ELRC No. 2191 of 2016 the court found that the Respondent had employed unionisable employees, but it held that the Claimant had failed to specifically plead and prove the list and identity of the employees it considered unionisable staff. The Court further held that the Claimant had failed to avail to the court a list of the said unionisable staff and an order from



the Minister authorizing deduction and remittance of agency fees from wages of the Respondent's unionisable staff as required under section 49 of the *Labour Relations Act*, 2007.

5. The Respondent averred that order compelling the Respondent or any other party to submit a list of unionisable employees is an issue that ought to have been raised in the previous suit as between the parties herein. Any attempts to introduce the same issues in this suit is an abuse of the court process.
6. The Respondent further averred that the suit herein was premature, misconceived and an abuse of the court process as the Claimant has not requested the Cabinet Secretary (Minister) in the required prescribed form to provide it with the alleged list of unionisable employees as required by section 48 and 49 of the *Labour Relations Act*.
7. The Respondent averred that the request and prayers before the court were untenable and an abuse of court process as the Respondent had no obligation to provide any list to the Claimant without following the Provisions of section 48 and 49 of *Labour Relations Act*. The Respondent prayed the Claimant's suit be dismissed with costs to the Respondent.
8. The court on 18<sup>th</sup> April, 2023 upon perusal of the amended claim and response and together with documents attached to the Notice of motion dated 15<sup>th</sup> February, 2022 was persuaded that the only issue in contention was the single issue of whether the court should order the Respondent to furnish the Claimant with a list of unionisable employees in its employ and who are not members of the Claimant union for the purposes of agency fees.
9. The Court observed that the matter could therefore be dispensed with by written submissions since the court by its judgment delivered 8<sup>th</sup> April, 2021 (O.N. Makau J) had observed that the Claimant's union was entitled to agency fee from all unionisable employees of the Respondent.

### **Determination**

10. Having considered this matter as above and in light of the decision of Makau J, it is clear that most of the issues being canvassed by the parties had been argued before my brother Judge. The learned Judge fell short of granting the orders sought save that the claimant union never pleaded the issue properly before him. The learned judge therefore declared that the claimant was entitled to agency fee however it was not for the respondent to provide the claimant with the claimant with a list of employees in its service that were unionisable but not members of the claimant for purposes of agency fee.
11. The Court is of the view that the learned judge could have acted per incuriam when he became of the view that it was not the responsibility of the respondent to provide a list of unionisable employees for purposes of agency fee.
12. I have section 49 of the *Labour Relations Act* which provides:
  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; (emphasis supplied)
  - (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.

14. From the above provision it is clear that the Claimant union who was to request the minister to issue an order compelling the Respondent herein to deduct an agency fee. The request was to be signed by the union and the employer and the trade union was to supply list of all employees prepared by the employer in respect of whom deduction was proposed to be made.

15. As observed above, the learned Judge appeared to have acted per incuriam when he became of the view that it was the claimant to provide the list of unionisable employees. This is however an error of judicial discretion that could only be corrected by way a review application brought under the rules of the Court or an appeal to the Court of appeal. The application before me does not present itself as a review application. It in fact asks this court to grant an order among others directing the respondent to immediately or within 7 days order the respondent to furnish the claimant/applicant with list of companies it has outsourced its unionisable employees from.

16. This issue was before Honourable Justice Makau and can only be revisited either by way of an application for review or an appeal to the Court of Appeal. This Court being a court of co-ordinate jurisdiction cannot correct a discretionary error by the learned judge unless made by way of a review application.

17. To this extent this Court finds it hand tied and have not choice but to dismiss the application with no order as to costs.

18. It is so ordered.

**DATED AT NAIROBI THIS 5TH DAY DECEMBER, 2023**

**DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2023**

**Abuodha Nelson Jorum**

**Judge**

