



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 393 OF 2019

[Formerly Mombasa E&LRC Cause Number 36 of 2019]

[Consolidated with Nairobi Cause Numbers. 866 of 2019, 222 of 2019, 724 of 2019 and 400 of 2019; Nakuru E&LRC Cause Number 31 of 2019; and Kisumu E&LRC Cause Numbers. 23 of 2019, 41 of 2019, 42 of 2019]

BETWEEN

KENYA NATIONAL UNION OF NURSES.....CLAIMANT

VERSUS

- 1. KILIFI COUNTY PUBLIC SERVICE BOARD**
- 2. KWALE COUNTY PUBLIC SERVICE BOARD**
- 3. TANA RIVER COUNTY PUBLIC SERVICE BOARD**
- 4. TAITA TAVETA COUNTY PUBLIC SERVICE BOARD**
- 5. MANDERA COUNTY PUBLIC SERVICE BOARD**
- 6. WAJIR COUNTY PUBLIC SERVICE BOARD**
- 7. NAIROBI COUNTY PUBLIC SERVICE BOARD**
- 8. ISIOLO COUNTY PUBLIC SERVICE BOARD**
- 9. MARSABIT COUNTY PUBLIC SERVICE BOARD**
- 10. KIAMBU COUNTY PUBLIC SERVICE BOARD**
- 11. NYANDARUA COUNTY PUBLIC SERVICE BOARD**
- 12. KIRINYAGA COUNTY PUBLIC SERVICE BOARD**
- 13. KERICHO COUNTY PUBLIC SERVICE BOARD**
- 14. BARINGO COUNTY PUBLIC SERVICE BOARD**
- 15. ELGEYO MARAKWET COUNTY PUBLIC SERVICE BOARD**
- 16. NAKURU COUNTY PUBLIC SERVICE BOARD**

17. NAROK COUNTY PUBLIC SERVICE BOARD

18. KISII COUNTY PUBLIC SERVICE BOARD

19. KISUMU COUNTY PUBLIC SERVICE BOARD

20. BUSIA COUNTY PUBLIC SERVICE BOARD

21. TRANSNZOIA COUNTY PUBLIC SERVICE BOARD

22. KAKAMEGA COUNTY PUBLIC SERVICE BOARD

23. BUNGOMA COUNTY PUBLIC SERVICE BOARD

24. VIHIGA COUNTY PUBLIC SERVICE BOARD

25. WYCLIFFE AMBETSA OPARANYA

26. MINISTRY OF PUBLIC SERVICE, YOUTH AND GENDER, STATE

DEPARTMENT OF PUBLIC SERVICE

27. MINISTRY OF HEALTH.....RESPONDENTS

Rika J

Court Assistant: Emmanuel Kiprono

JUDGMENT

1. The Claimant filed various Claims against County Public Service Boards, at different Stations countrywide. The main prayer across the Claims, is on collection and payment to the Claimant, of trade union dues.
2. In a Ruling delivered at Mombasa, in Cause Number 36 of 2019, the Court directed that the disparate Claims be gathered and brought to the head Station at Nairobi for purposes of consolidation and directions on hearing and disposal.
3. The files were placed before the Principal Judge, consolidated and placed before the undersigned Judge for hearing.
4. The 25th Respondent is sued in his capacity as the Chairman of the Council of Governors. He issued a circular to all County Governments, dated 15th February 2019, directing them not to deduct trade union dues from Claimant's members, but to instead pay full salaries to those members, who would then remit their dues directly to the Claimant, if they so wished.
5. Some of the County Governments defaulted in deduction and payment of trade union dues, which the Claimant attributed to the instructions given by the 25th Respondent.
6. The 26th Respondent is the Ministry which processes public officers' payrolls, through its Integrated Payroll and Personnel Database [IPPD]. The Claimant states that the Ministry interfered with union deductions, relying on the illegal instructions of Governor Oparanya, the 25th Respondent.
7. The 27th Respondent was named in one of the files – 724 of 2019 as a Respondent, ostensibly for the same reason the 26th Respondent has been named as a Respondent.
8. The Claimant prays for Judgment against the Respondents for: -
 - a. Quashing of the Chairman Council of Governor's circular dated 15th February 2019.
 - b. The Respondents to continue deducting and remitting trade union dues in favour of the Claimant, in accordance with Legal Notice No. 160 of 2018.
 - c. Declaration that the Chairman Council of Governors, has no mandate to issue directives to County Public Service Boards directing them not to deduct and remit trade union dues to the Claimant.
 - d. An order barring the Chairman Council of Governors, his agents, servants or representatives from issuing circulars interfering with the membership of the Claimant, and/or deductions and remittance of trade union dues.

e. An order directing the Respondent County Governments to pay from their own funds un-deducted and un-remitted trade union dues up to date.

f. Any other suitable reliefs.

g. Costs.

9. The Respondent County Governments filed different Statements of Response, adopting similar lines in response to the Claim. They acknowledge that they have a Recognition Agreement with the Claimant. They acknowledge the presence of Legal Notice No. 160 of 2018, mandating them to deduct and remit trade union dues in favour of the Claimant. They also acknowledge receipt of the circular by the Chairman of Council of Governors. They state that they acted on that circular, by paying nurses under their public service, full salaries with the expectation that the nurses would pay their trade union dues directly to the Claimant. They do not hold funds, which can be paid directly to the Claimant.

10. The 25th Respondent admits it operates the IPPD. It had consultations with the Claimant and the 26th Respondent on implementation of Legal Notice No. 160 of 2018 through the IPPD. Deductions were effected through the payroll system on 1st January 2019. There was however, some technical problem with regard to trade union dues owing to COTU-K from the same officers, leading to over-deduction of their monthly salaries. Otherwise the 25th Respondent states it had dutifully implemented Legal Notice No. 160 of 2018 through IPPD. It has not acted on the instructions of the Council of Governors.

11. On 5th February 2021, it was agreed that the dispute is considered and determined on the strength of submissions, pleadings and documents. It was also agreed that the Claimant avails an updated status report, on all the County Governments. Negotiations had been ongoing between the Claimant and some of the County Governments, simultaneous with this litigation. A good number of the County Governments stated they had been remitting trade union dues, and were fully compliant.

12. Parties agreed to have the Claim considered and determined under Rule 21 of the Court's Procedure Rules, 2016. Judgment was slated for 10th March 2022, but due to the large number of Respondents involved and the sheer volume of documents and pleadings, the Court was not able to deliver, and informed Parties that Judgment would be delivered on notice.

13. The issues are: -

a. Whether the circular dated 15th February 2019 issued by the Chairman Council of Governors should be quashed.

b. Whether the Respondent County Governments should continue deducting and remitting trade union dues to the Claimant, pursuant to Legal Notice No. 160 of 2018.

c. Whether it should be declared that the Chairman Council of Governors has no mandate to issue directives to the County Public Service Boards, concerning trade union dues.

d. Whether the Chairman, Council of Governors, his agents, servants and/ or representatives should be restrained from interfering with Claimant's membership, regarding deduction and remittance of trade union dues.

e. Whether respective County Governments should pay to the Claimant Union, un-deducted and un-remitted trade union dues.

f. Who should bear the costs of the Claim.

The Court Finds: -

[i] Circular of 15th February 2019.

14. The presence of Legal Notice No. 160 of 2018, is acknowledged by all the Parties. They have been acting on it. It was issued by the Cabinet Secretary for Labour and Social Protection, mandating an Employer who employs more than 5 Employees, belonging to the Claimant Union, to deduct on a monthly basis, a specified sum in respect of trade union dues; and to pay to the Claimant within 10 days of deduction, by cross-cheque or electronic funds transfer. The payee bank details are stated. Deduction would commence within 30 days of receiving the Legal Notice.

15. As concluded by the Court in the Ruling of 30th September 2019, the circular of 15th February 2019 is completely illegal. It seeks to undo Legal Notice No. 160 of 2018. Chairman Council of Governors is not the Cabinet Secretary responsible for labour. He does not regulate employment and labour relations. He is unknown to the Labour Relations Act, 2007. Once a Ministerial Order issues under Section 48 of the Labour Relations, the relevant Employer shall commence deductions uninterrupted, within 30 days of receiving the Legal Notice.

16. The Legal Notice could only be reversed by the issuer, under Section 50[2] of the Labour Relations Act if he is satisfied that the order was obtained by misrepresentation of fraud; money is not being paid into the designated account; or money is being used for a purpose other than the lawful trade union or federation activities. The issuer is the Cabinet Secretary, Labour.

17. The Council of Governors is founded under Section 19 of the Intergovernmental Relations Act No 2 of 2012. Its functions do not extend to regulation of employment and labour relations.

18. Section 52 of the Labour Relations Act, 2007, allows Employees to directly remit trade union dues to their trade unions. This is an option which is exercised by the Employee. It is not to be exercised through the command or advice of an Employer, a Trade Union, or a group far removed from industrial relations, such as the Council of Governors. It is the Employee and the Employee alone, who is granted the option under Section 52, to pay trade union dues directly to his trade union. No nurse is shown to have freely exercised this prerogative, and Governor Oparanya, Chairman Council of Governors, had no power, to direct any nurse to go for direct trade union dues payment.

19. The circular by Chairman Council of Governors, dated 15th February 2019, was needless and an overreach. The Chairman ignited these serial disputes throughout the country, by his misreading of the law.

20. *The circular dated 15th February 2019, ref. COG/6/40.1B Vol.6 [74] issued by the Chairman Council of Governors, is hereby quashed.*

[ii] Continuation of deduction and remittance of trade union dues.

21. The Respondent County Governments are bound to continue deducting and remitting trade union dues, in accordance with the terms of the Legal Notice No. 160 of 2018.

22. The mode of payment is clear in the Legal Notice. The 26th Respondent, through Principal Administrative Secretary / Accounting Officer Mary Kimonye, explains persuasively that the 26th Respondent has held consultative meetings with the Claimant, and agreed on how the Claimant can be assisted in collection of its dues, through the IPPD Unit. It has been implementing payment, facilitating the Claimant, though not under obligation to do so under the Legal Notice. The Claimant should not make unnecessary demands on the 26th Respondent, but should pursue dialogue with the 26th Respondent, to perfect implementation of the facility, which has already been offered to the Claimant by the 26th Respondent.

23. *The trade union dues shall continue to be deducted and remitted to the Claimant, by the respective County Governments, in accordance with Legal Notice No. 160 of 2018, and Section 48 of the Labour Relations Act, 2007.*

[iii] Mandate of the Chairman, Council of Governors

24. It has been concluded that the circular or 15th February 2019 was an overreach. The Council of Governors and its Chair have no mandate in instructing County Public Service Boards, not to deduct and remit trade dues. No such mandate can be read from the Labour Relations Act, or the Intergovernmental Relations Act. ***It is declared that the Chairman Council of Governors, has no mandate to issue any instructions to County Public Service Boards, directing them not to deduct and remit trade union dues to the Claimant.***

[iv] Restraint

25. From the above conclusions, it follows that the Chairperson Council of Governors, his agents, servants or representatives, must be, and ***is hereby, restrained from issuing circulars, interfering with the membership of the Claimant, with respect to deduction and remittance of trade union dues.***

[v]. Owing trade union dues.

26. The Court is not able to make a conclusion on the status of payments made by each of the Respondents. It is not conclusive from the material supplied to the Court, whether all the County Service Boards are up-to-date, or in arrears.

27. Payment of trade union dues is an ongoing, monthly, undertaking. It is not a one-off. It is not possible for the Court to conclude, that the sums pleaded by the Claimant in specific files, have been paid or other liabilities subsequently accrued. It would take the Court considerable time to reconcile all the records from all the Counties, and make an informed decision on the status of each County, with respect to deduction and remittance of trade union dues, from 2019. The status report availed by the Claimant Union is not conclusive.

28. More work needs to be done, to authenticate the figures and establish the level of each County's indebtedness to the Claimant Union.

29. Such work can suitably be carried out at the respective Counties' level.

30. There is no evidence in the respective files as would enable the Court to state conclusively, that the specific sums claimed have been established. There is no foundation is granting the Claimant Union monetary awards.

31. The Claimant has not established if, and to what extent, its members, having received full salaries following the circular of 15th February 2019, paid trade unions directly. The circular was suspended on 16th July 2019 through an order of the Court. If the County Governments paid full salaries to the nurses, it would be over the period between February 2019 and July 2019. The Court needed to be told clearly by the Claimant whether it received direct payments from its members, and over what period. Up to which date did the payment of full salaries go? When did it stop, and deductions resume? The 26th Respondent furthermore states it continued to assist the Claimant, by effecting deductions through the payroll system, and did not act on the instructions of the Chairman Council of Governors.

32. Compelling the Respondent Counties to pay the amounts claimed, from their own treasuries, without proper reconciliation and accounting for what was received directly by the Claimant Union from its members, would create the likelihood of the Respondent County Governments, paying trade union dues twice.

33. The mathematical aspect of the dispute does not add up. More work needs to be done, and the Court is persuaded this should be carried out at the respective Counties, with the aid of the respective County Labour Offices.

34. *There is no evidence to specifically prove monetary claims.*

35. *Granted however, that deduction and remittance of trade union dues is an ongoing obligation, the Claimant Union is at liberty to pursue afresh, recovery of any sums claimed to be due to-date, from any County Government, at the respective Counties' Level.*

36. *No order on the costs.*

IN SUM, IT IS ORDERED: -

a. The circular dated 15th February 2019, ref. COG/6/40.1B, Vol 6 [74], issued by Chairman Council of Governors, is hereby quashed.

b. The trade union dues shall continue to be deducted and remitted to the Claimant, by the respective County Governments, in accordance with Legal Notice No. 160 of 2018 and Section 48 of the Labour Relations Act, 2007.

c. It is declared that the Chairman Council of Governors, has no mandate, to issue any instructions to the County Public Service Boards, directing them not to deduct and remit trade union dues to the Claimant.

d. The Chairman Council of Governors, his agents, servants or representatives, are restrained from issuing circulars, interfering with the membership of the Claimant, with respect to deduction and remittance of trade union dues.

e. The prayer for monetary awards in un-remitted trade union dues has not been specifically proved.

f. Granted that deduction and remittance of trade union dues is an ongoing obligation, the Claimant is at liberty to pursue afresh, recovery of any sums claimed to be due to-date, from the respective County Governments, at the respective Counties' Level.

g. No order on the costs.

Dated, signed and released to the Parties electronically, under the Ministry of Health and Judiciary Covid-19 Guidelines, at Chaka, this 22nd day of April 2022.

James Rika

Judge