



Kayaja & 11 others v University of Nairobi (UON) & 2 others; Cabinet Secretary, Labour and Social Protection & another (Interested Parties) (Cause E 414 of 2022) [2022] KEELRC 13505 (KLR) (13 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13505 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E 414 OF 2022
BOM MANANI, J
DECEMBER 13, 2022

BETWEEN

WAFULA DAVID KAYAJA 1ST CLAIMANT
KURIA PETER MUNGAI 2ND CLAIMANT
WANAMBISI THOMAS ANDETO 3RD CLAIMANT
ISHUGA KALEGI EVERLYNE 4TH CLAIMANT
MURABA LOISE WANGUI 5TH CLAIMANT
JUMA WAFULA 6TH CLAIMANT
KARANJA PATRICK 7TH CLAIMANT
HELEN NKOROI 8TH CLAIMANT
ODUOR ALFRED SAMSON 9TH CLAIMANT
CHARLESKAMADI 10TH CLAIMANT
NJUNG'E NICHOLUS SHIVACHI 11TH CLAIMANT
NYARIKI CLEOPHAS ONYIEGO 12TH CLAIMANT

AND

UNIVERSITY OF NAIROBI (UON) 1ST RESPONDENT
**KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS (KUDHEIHA) 2ND RESPONDENT**
KENYA UNIVERSITIES STAFF UNION (KUSU) 3RD RESPONDENT

AND



CABINET SECRETARY, LABOUR AND SOCIAL PROTECTION INTERESTED PARTY

KENYA TERTIARY SCHOOL WORKERS UNION (KUTASWU). INTERESTED PARTY

(Originating from ELRC Petition No 112 of 2018)

RULING

1. By a memorandum of claim filed in this court on June 16, 2022, the claimants have instituted these proceedings against the respondents principally challenging the decision by the 1st respondent to deduct agency fees from them on behalf and for the benefit of the 2nd and 3rd respondents. The claimants challenge this decision as illegal and want it stopped.
2. Together with the memorandum of claim, the claimants have filed the application dated June 15, 2022 seeking interim orders stopping the 1st respondent from deducting agency fees from the membership of the 2nd interested party who are employees of the 1st respondent for the benefit of the 2nd and 3rd respondent.
3. In response to the claim and application, the 1st respondent has filed: a memorandum of response; witness statement; a relying affidavit dated August 30, 2022 and a supplementary affidavit dated November 2, 2022. I should also mention that the claimants have filed a further affidavit dated 13th October 2022 in reaction to the pleadings filed by the 1st respondent.

Submissions on the Application

4. The claimants' submissions on the application are as set out in their affidavits in support of the application and submissions filed on their behalf dated October 18, 2022. In a nutshell, it is the claimants' case that the 1st respondent has unlawfully been deducting agency fees from them on behalf and for the benefit of the 2nd and 3rd respondents.
5. The claimants contend that since there is no order issued to the 1st respondent under section 49 of the Labour Relations Act (LRA) to deduct agency fee on behalf of the 2nd and 3rd respondents, the current deductions are illegal and in violation of the right to fair labour practice. In the premises, the deductions ought to be halted and the 1st respondent ordered to reimburse the claimants the amounts so far deducted from them.
6. On the other hand, the 1st respondent contends that the issue of whether or not it is obligated to recover agency fees from the claimants for and on behalf of the 2nd and 3rd respondents has been litigated and settled. That the court has found that the 1st respondent is under this obligation.
7. The premise for this position is that the 1st respondent has been and continues to deal with three trade unions with which it has recognition agreements to represent various cadres of its employees. The 2nd and 3rd respondents are two of the three trade unions.
8. It is the 1st respondent's case that it has negotiated and registered collective bargaining agreements (CBA) with the three trade unions under which the 1st respondent's unionisable employees are presently drawing benefits. These benefits also accrue to the 1st respondent's employees who though eligible to join the three trade unions, are non-members. Consequently, the 1st respondent is, in law,



obligated to collect and remit to the three trade unions agency fees in respect of the latter category of employees.

9. The 1st respondent argues that it has no recognition agreement with the 2nd interested party, a trade union that the claimants are currently associated with having resigned from the 2nd and 3rd respondents. Therefore, there is no existing CBA between the 1st respondent and the 2nd interested party. Due to this state of affairs, the employees who belong to the 2nd interested party still benefit from the current CBAs negotiated between the 1st, 2nd and 3rd respondents. And hence the duty by these employees to remit agency fees to these unions.

Res-judicata

10. The 1st respondent has argued that the current claim and the accompanying application are bad in law for offending the principle on *res-judicata*. It is the 1st respondent's case that the question relating to its obligation to deduct agency fees from employees who had joined the 2nd interested party but who still draw a benefit from CBAs negotiated with the 2nd and 3rd respondent was raised and determined in ELRC Petition No 112 of 2018.
11. On their part, the claimants readily admit being members of the 2nd interested party having resigned from membership of the 2nd and 3rd respondents whichever applied to them. They also do not deny that the 2nd interested party has no recognition agreement with the 1st respondent. they also do not deny that they are currently beneficiaries of the CBAs negotiated between the 1st, 2nd and 3rd respondents. What they appear to emphasize is that since there is no order authorizing the 1st respondent to deduct agency fees from them under section 49 of the [LRA](#), the current deductions by the 1st respondent are unlawful.
12. I have looked at the court decision in [Kenya Tertiary and Schools Workers Union \(Ketaswu\) v University Council University of Nairobi; Kudbeiba Workers \(Interested party\)](#) [2021] eKLR. It is clear to me that that suit was by the 2nd interested party on behalf of its membership raising among other matters the question whether it was lawful for the 1st respondent to collect agency fees for the 2nd and 3rd respondents from the members of the 2nd interested party who are employees of the 1st respondent without the benefit of an order in terms of section 49 of the [LRA](#).
13. In her decision Maureen Onyango J said as follows on the issue of agency fees:-

“The third prayer is for orders prohibiting the respondent from deducting agency fees from the salaries of the 704 employees the petitioner alleges are its members. Agency fee is provided for in section 49 of the [Labour Relations Act](#) and is deducted where an employee who is not a member of a union benefits from a CBA negotiated by the union.

The petitioner has not negotiated any CBA with the respondent. The CBAs that all the employees of the respondent benefit from are negotiated by the interested party or the two other unions that the respondent has recognition agreements with. The employees who are not members of the said unions are therefore liable to pay agency fees.”
14. With this, the court determined the issue of agency fees raised by the 2nd interested party on behalf of its members who include the claimants. With respect I do not think that it is open for the claimants to raise the issue again, having been raised by the 2nd interested party in the now determined petition. The 2nd interested party instituted the petition in its capacity as a representative of the claimants and several other employees of the 1st respondent who have joined the 2nd interested party. Therefore, the matter is *res-judicata*.



15. The claimants and 2nd interested parties argue that the deductions by the 1st respondent are in contravention of section 49 of the LRA as no ministerial order has issued. This issue was raised in the now concluded petition. The avenue open to the parties was to appeal or seek review of that decision. I do not understand the 2nd interested party as suggesting that it challenged the order as suggested above.

Determination

16. Having arrived at the conclusion that this cause is *res-judicata*, it is hereby struck out with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF DECEMBER, 2022

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the 1st Respondent

..... for the 2nd Interested Party

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

