



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2191 OF 2016**

**BANKING INSURANCE AND FINANCE UNION (KENYA)...CLAIMANT**

**VERSUS**

**PARAMOUNT UNIVERSAL BANK KENYA LTD.....RESPONDENT**

**JUDGEMENT**

1. The claimant is a trade union registered to represent unionisable employees in the banks, insurance companies, Saccos and other financial institutions. The respondent is a commercial bank trading in Kenya and it is a member of the Kenya Bankers Association.

2. The claimant has a recognition agreement with Kenya Bankers Association since 4.10.2000 and they have also signed a Collective Bargaining Agreement (CBA) setting out terms and conditions of employment on behalf of employees captured in the preamble clause of the CBA including section Heads (Supervisions, Checkers, Clerks and Copy Typists, Technical and subordinate staff.

3. On 6.2.2009 the Minister for Labour vide Gazette Notice No. 924 issued an order to all members of the Kenya Bankers Association to deduct and remit Agency fees from the employees covered by the CBA but are not members of the claimant union.

4. On 14.5.2014 the claimant and the Kenya Bankers Association recorded settlement in trade dispute No 508 of 2009 that all unionisable employees who were not members of the claimant but covered by the CBA be deducted agency fees from 1.6.2014. However, the respondent never deducted and remitted agency fees as indicated above despite the claimant's letters dated 28.5.2014 and 6.8.2014.

5. As a result of the foregoing matters, the claimant brought this suit on 27.10.2016 contending that the respondent is in violation of section 49 of the Labour Relations Act and prayed for the following relief:

*a. This honourable court is prayed to be pleased to declare that the claimant is entitled to agency fees from all the unionisable employees of the respondent who are not members of the union.*

*b. This honourable court be pleased to order that the respondent remit agency fees to the claimant and payments should be effected by crossed cheque into the claimants account No. 01-020-741448-00 at Standard Chartered Bank Limited Harambee Avenue Branch in accordance with Gazette Notice No. 924 of 6<sup>th</sup> February 2009.*

*c. Costs of this claim*

*d. Any other relief this honourable court deems just and necessary to award.*

6. The respondent filed defence on 8.5.2017 denying the alleged violation of the law and averred that it does not have, in its banks, employees who are union members or who are not members but are liable to pay agency fees. Consequently it averred that the claimant is not entitled to the reliefs sought and urged the court to dismiss the suit with costs.

7. The suit was disposed of by written submissions on the strength of the documents and written evidence on record.

**Claimants Case**

8. The Claimant's General Secretary, Mr Isaiah Kubai filed a written statement on 27.1.2021 in which he reiterated the facts set out above regarding the relationship between the union and the Kenya Bankers Association and by extension the respondent. He maintained that the respondent has persisted in failing to perform its obligation under section 49 of the Act, namely to deduct from its unionisable employees, who are not members of the claimant agency fees and remit it to the claimant as per the order given by the Labour Minister and the agreement between the claimant and the Kenya Bankers Association.

9. He reiterated that the respondent has persisted in the said default despite demand letters served upon it by the claimant on 28.5.2014 and 6.8.2014 contending that all unionisable employees working in the bank are outsourced through independent contractors. He further contended that the respondent has further stated that most of its employees are engaged under fixed term contracts but it has not demonstrated to the court which employees are on so engaged nor has it produced any copies of their fixed term contracts.

10. Finally he stated that the law provides for payment of agency fees for non-members who are benefitting from a CBA negotiated by a union. He contended that the claimant has already signed a CBA for 2019 – 2021 with the Kenya Bankers Association and it is entitled to agency fees from the respondent's unionisable employees who are not members of the claimant. He therefore prayed for the reliefs sought plus costs of the suit.

### **Defence Case**

11. The respondent's legal officer, Mr Timothy Kimani, filed a written witness statement dated 15.9.2020 in which he admitted that the respondent is a member of the Kenya Bankers Association. He further admitted that Association has entered into agreement with the claimant requiring members of the Association to deduct and remit agency fees and union dues from all union members and unionisable employees. He further stated that the respondent does not have staff members who are members of the claimant or who qualify as unionisable employees as contemplated by the said agreement between the claimant and the Association.

12. He contended that:

- a. Most of its permanent employees constitute managers and personnel in management who do not qualify as unionisable employees.*
- b. The respondent has also engaged independent contractors to provide subordinate staff personnel through outsourcing who include cleaners, security guards and technical staff, and*
- c. The respondent has also incorporated fixed term contracts with several of its employees.*

13. H admitted that the respondent has received several letters from the claimant demanding agency fees but it responded by the letter dated 5.6.2014 clarifying that it does not employ unionisable employees in the bank. He therefore prayed for the suit to be dismissed with costs because there is no agency fees due from the respondent to as alleged

### **Issues for determination**

14. Having carefully considered the pleadings, evidence and submissions filed by both parties, the issues for determination are:

- a. Whether the respondent has employed in its banks unionisable employees who are not members of the claimant.*
- b. Whether the reliefs sought by the claimant should be granted.*

### **Unionisable employees employed in the respondent's banks.**

15. The respondent's witness stated in paragraph 7(a) (c) of his written statement that:

“

- a. Most of its permanent employees constitute managers and personnel in management who therefore do not qualify as unionisable employees.*
- b. The respondent has also engaged independent companies to provide subordinate staff personnel who include cleaners, security guards and technical staff. As such the Respondent has no employment contracts with individuals but instead pays a cumulative amount to the independent companies for the service provided ; and*
- c. The respondent has also incorporated fixed term contract with its several of its employees.”*

16. My interpretation of paragraph 7(a) above is that the respondent's permanent employees are mostly in the management cadre but a few are unionisable. Again the meaning of paragraph 7(b) above is that the respondent has outsourced a bigger part of its unionisable staff from independent contractors. Finally paragraph 7(c) above clarifies that the respondent ha also employed several employees under fixed term contracts, who may either be managers or unionisable cadres.

17. My above interpretation of paragraph 7 of the said witness statement leads me to the finding that indeed the respondent has employed in its banks unionisable employees. However, the number and identity of the said employees have not been pleaded or proved by the claimant.

18. It is common knowledge that in Kenya, litigation is adversarial and not inquisitorial. It follows that the court can only travel as far as the destination marked by the parties in their pleadings and the evidence tendered. The corollary to the foregoing is that parties are bound by their own pleading and the court will not aid the parties who fail to make detailed, elegant and precise pleadings.

19. Again the court will not engage in inquisitorial process by ordering the parties sued to produce particulars or information which it has not

been invited by the suing party to do so. Since the claimant did not see the need of availing a list of the unionisable staff in the respondent's employment or to ask the court to compel the respondent to avail information of unionisable staff, I will let matters as they are in the pleadings.

### **Reliefs Sought**

20. I have found that the respondent has in its banks employed unionisable employees. There is no evidence that the said unionisable staff are members of the claimant union. Since the parties have agreed that they have a CBA negotiated by the claimant on behalf of all the respondent unionisable staff, I make declaration that the claimant is entitled to agency fees from all the unionisable employees of the respondent bank, who are not members of the union by didn't of section 49 of the Labour Relations Act.

21. However, in view of any finding herein above that the claimant has not proved the numbers of the unionisable employees in the respondent's employment who should pay agency fees to it, I decline to order the respondent to remit agency fees as prayed. Such prayers can only be granted based on a list of unionisable employees of the respondent which has been attached on an application to the Minister for Labour under section 49(2) (b) of the Labour Relations Act, and upon an order by the said Minister given under section 49(1) of the Act.

22. Although the claimant referred to an order for agency fees issued on 6.2.2009 under Gazette Notice No 924, there is no evidence given to show that the said order applied to the CBA in the instant suit. Again, the claimant did not tender evidence to show that the list of unionisable staff of the respondent in 2009 has not changed todate. Consequently I decline to grant any order to compel the respondent to remit agency fees to the claimant since it is not the employer to remit its own funds but funds deducted from unionisable employees.

### **Conclusion or Disposition**

23. I have found that the respondent has employed unionisable employees in its banks. However since the claimant has failed to avail a list of the said unionisable staff and an order from the Labour Minister authorizing deduction and remittance of agency fees from wages of the respondent's unionisavle staff who are not members of the claimant, I decline to compel the respondent to remit union dues as prayed by the claimant. Consequently I enter judgement for the claimant only to the extent of the declarations made above. Each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021**

**ONESMUS MAKAU**

**JUDGE**

**In the presence of:-**

Ms Kubai Advocate for the Claimant, and

Ms Mugi Advocate for the Respondent.

### **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 15<sup>th</sup> April 2020, this judgment 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.**

**ONESMUS N. MAKAU**

**JUDGE**