



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.18 OF 2019**

***(Before D.K.N.Marete)***

**KENYA UNION OF NURSES.....CLAIMANT**

**VERSUS**

**MURANG'A COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT**

**MURANG'A COUNTY GOVERNMENT.....2ND RESPONDENT**

**JUDGMENT**

This matter was originated by way of a Memorandum of Claim dated 29th May, 2019. The issues in dispute are therein cited as;

1. *Unlawful stoppage of deduction and remittance of Trade Union Dues by the Respondents from January, 2019 to-date.*
2. *Non-compliance with the Gazette Notice No.160 of 2018 by the Respondents.*
3. *Refusal by the Respondent to deduct and Remit the Union Dues of Ksh.765,0052.35 into the Claimant's gazetted account from January, 2019 to-date"*

The Respondent in a Respondent's Statement of Defence dated 9th November, 2020 denies the claim and prays that the same be dismissed with costs.

That Claimant's case is that on 15th February, 2019, the 3rd Respondent in his capacity as the chair, Council of Governors, issued a circular to all County Governments directing non-deduction of union dues to the claimant/ union and pay all salaries to nurses wholly and directly. This has since been acted on and amounts to an anti-trade union activity.

The Claimant's other case is that this was without authority, locus stand, and did not constitute a matter of common interest as envisaged and specified under Section 20 (1) (c) of the Intergovernmental Relations Act No.2 of 2012 as there was not strike in all the 47 counties to warrant any consideration by the 3<sup>rd</sup> Respondent either in his own capacity or in his capacity as Chairman of the Council of Governors with Section 20 (1)(c) provides as follows;

*"The Council shall provide a forum of-*

1. *(c) considering matters of common interest to county governments".*

The claimant's other case comes out as follows;

4. *That, the Applicant avers that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents have taken action based on that circular of the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> February 2019 and refused to deduct and remit the union dues from the wages of the nurses who are members of the Applicant/Claimant union hence causing the Applicant immense prejudice as the Applicant cannot carry out its operations without funds from its members.*
5. *That, the Applicant/Claimant 1<sup>st</sup> and 2<sup>nd</sup> Respondents has denied the Claimant/Applicant revenue from January, 2019 now amounting to Kshs.765,001.35 being trade union dues deducted from the Applicant's members and not remitted into the specified*

account in Legal Notice No.160 of 2018.

6. That, the Applicant avers the circular dated 15<sup>th</sup> February 2019 offends the provisions of Section 19(1)(i) and (6) of the Employment Act of 2007 on deduction of wages by employee from employer as there is a Legal Notice No.160 of 2018 on deduction of union dues issued by the minister. Section 19(1)(i) and (6) states as follows;

“19.Deductions of wages.

(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee-

(i) such other amounts as the Minister may prescribe.

(6) where proceedings are brought under subsection (5) in respect of failure by the employer to remit deductions from an employee's remuneration, the court may, in addition to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages and pay the intended beneficiary on behalf of the employee with the employer's own funds.”

7. That, the Applicant/Claimant avers that Section 52 of the Labour Relations Act does not provide mandatorily that members of a trade union should pay subscription fees directly to the trade union and that the same section cannot apply where the minister has issued an Order/Legal notice directing employers to deduct union dues from salaries to members of the union.

17. That, by failing to deduct union dues from the members of the Applicant/Claimant despite there being a Legal Notice No.160 of 2018 directing all the employers to deduct and without a notice contravened the right to fair administrative action which states inter-alia:-

“IN EXERCISE of the powers conferred by section 48 of the Labour Relations, 2007, the Cabinet Secretary for Labour and Social Protection makes the following Order-

5. This Order may be cited as the Kenya National Union of Nurses Deduction of Union dues Order, 2018.

6. An employer who employs more than five employees belonging to the Kenya National Union of Nurses shall:-

(a) deduct, on a monthly basis, the sum specified in the schedule in respect of trade union dues from the wages of an employee who is a member the Kenya National Union of Nurses.....”.

She prays thus,

1. An order quashing the circular dated 15<sup>th</sup> February 2019 REF: COG/6/40/1B Vol.6 (74) by the 3<sup>rd</sup> Respondent.

2. An order directing the 1<sup>st</sup> & 2<sup>nd</sup> Respondents to continue deducting and remitting union dues to the specified bank account and as scheduled in the Legal Notice No.160 of 2018.

3. A Declaratory Order declaring that the 3<sup>rd</sup> Respondent in his personal capacity or in his capacity as the Chairman of the Council of Governors has no mandate to issue any directives to the County Public Service Boards directing them not to deduct and remit trade union dues to the Claimant/Applicant.

4. An Order barring the 3<sup>rd</sup> Respondent, his agents, servants or representatives issuing circulars interfering with the membership of the Applicant/Claimant and on deductions and remittance of union dues unless as provided for under the law.

5. An order directing the Respondents to jointly pay from their own funds an amount of trade union dues in favour of the Claimant now amounting to Kshs.765,001.35 and any un-deducted and unremitted union dues for the Applicant/Claimant up to date.

6. An Order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay from their own funds an amount of trade union dues in favour of the Claimant un-deducted and unremitted union dues for the trade union dues from March to October, 2018 amounting to Kshs.2,400,000

7. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent interest on the cumulative total of Ksh.2,400,000 and ksh.765,001.35 at the court rate.

8. Any other that the court may deem just and fit to grant.

9. Costs of the suit to be borne by the Respondents.

The Respondents case is that to the extent that the claim is founded on the circular dated 15th February, 2019, by the chair, Council of Governors, the claimant is non-suited as neither the Council of Governors or their chair are parties to this suit.

It is their further case that a challenge to the said letter would of necessity call for a joinder of these parties.

Para 5- Deductions resumed

Vide a court order dated 13th March, 2019

10. That, the Applicant union has a Recognition Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stating the terms of engagement on employment matters with the union but the said Respondents have violated the mandatory terms of the same Recognition Agreement by failing to deduct and remit union dues.

The issues for determination therefore are;

1. Whether the claimant is entitled to the relief sought?
2. Whether an employer who fails to deduct union dues should pay the same from its kitty and purse?
3. Who bears the costs of the claim?

The 1st issue for determination is whether the claimant is entitled to the relief sought. The Claimant in her written submission dated 2nd March, 2021 reiterates her case and submits that she has a valid Recognition Agreement and a subsisting CBA with the respondents. This binds the respondent to deduct union dues from her members and remit this to the union.

On this she relies on the authority of Kenya National Union of Nurses Deduction of Union Dues order, 2018 which she extensively cites in her submissions as follows;

*...these are the humble submissions of the Claimant.*

*1. The unilateral decision by Murang'a County Public Service Board to stop deductions and remittance of union dues for 7 months is contrary to Section 48 of the Labour Relations Act, 2007 and Section 50(8) of the Labour Relations Act. In that regard, these provisions are mandatory upon the employer to deduct and remit trade union dues and there are no alternatives but to comply.*

*2. It is out submissions that there is a Legal notice No.160 of 2018 issued by the Cabinet Secretary for Labour and Social Protection on behalf of the Claimant in the following terms;-*

IN EXERCISE of the powers conferred by Section 48 of the Labour Relations Act, 2007, the Cabinet Secretary for Labour and Social Protection makes the following Order:-

THE KENYA NATIONAL UNION OF NURSES DEDUCTION OF UNION DUES ORDER, 2018.

1. *This Order may be cited as the Kenya National Union of Nurses Deduction of Union Dues Order, 2018.*
2. *An employer who employs more than five employees belonging to the Kenya National Union of Nurses;*
  - a. *Deduct, on a monthly basis, the sum specified in the schedule in respect of trade union dues from the wages of an employee who is a member of the Kenya National Union of Nurses;*
  - b. *Pay, within ten days of the deduction, by crossed cheque or electronic funds transfer-*
    - i) *A sum of five hundred shillings deducted under paragraph (a) payable to the Kenya National Union of Nurses, account number 01120309515200, Cooperative Bank of Kenya, Aga Khan Walk, Nairobi; and*
    - ii) *A sum of one hundred and fifty shillings deducted under paragraph (a) payable to the Central Organisation of Trade Unions, account number 229-741-204, Kenya Commercial Bank, Moi Avenue Branch, Nairobi*
  - c. *Commence deduction trade union dues from an employee's wages within thirty days of being served with this Order by the trade Union; and*
  - d. *File returns with the Registrar of Trade Unions at P.O Box 40326-00100 Nairobi, within one month of making all the payments to the Union.*
3. *Legal Notice No.14611 of 2013 is revoked.*

The Claimant relies on a ruling dated 3rd February, 2021 in **Kenya National Union of Nurses vs. Busia County Public Service Board and Busia County Government (ELRC Cause E007 of 2020 (2020))** on a similar matter where an employer fails to deduct union dues, the court held in paragraph 17, 18, 19, 20 and 21 that;

17. The decision of the county government signified through its letter of 14 August 2020, in the view of the court, was a direct assault on the constitutional rights of employees as individual to associate.

18. Apart from the employee's right to associate, it would be abhorrent to our constitutional democracy to restrict and/or limit an employee's right to dispose of his wages in any lawful manner he so wishes.

19. According to the court, the decision of the county government was as well a calculated measure to weaken the union and thus a subtle attack on the right of the union to determine its own administration, programmes and activities, and to organize, and direct challenge to Articles 41(4) (a) & (b) of the constitution.

20. The county government must be aware too that where it fails to deduct and submit trade union dues, it may be ordered under the relevant provision of the Labour Relation Act to pay such trade union dues from its own resources.

21. The county government has and should not have any interest on how its employees dispose of their wages (employers do not make any part contribution in respect of trade union dues) and the excuse that because of circumstances beyond its control makes the deductions intermitted do not hold water.

She therefore submits a case of the respondents being held liable and being ordered to meet the not deducted union dues being payable from the respondent's kitty.

The respondents' submission dated 10th March, 2021 reiterates her case that the claimant is non suited for not enjoining the Chair, Council of Governors as the party to the suit.

In **Bakery, Confectionery, Food Manufacturing and Allied Workers' Union (K) v Milly Fruit Processors Limited (2014) eKLR** where the court observed thus;

*"I specifically note that the claimant only prayed for payment of dues not yet deducted, which dues were to come from the employer's kitty. Further the claimant did not address the court on the legal basis of requiring the Respondent to take over the liability of payment of union dues that had not been deducted. The Labour Relations Act which provides for the deduction of union dues is silent on what the claimant should do in such an event.*

*Section 19 of the Employment Act which provides for deductions from wages of employees, which would include union due does not provide for the employer to be penalized to make such deductions from its own funds.*

*Sub section 19 (5) provides for the penalizing of an employer to pay only if the employer has deducted but failed to remit the amounts for deductions to the beneficiary thereof.*

*The Claimant's prayer that the court directs the Respondent to pay from its kitty all the money it would have, except for its refusal/failure/negligence, deducted from its employees' wages and remitted to the trade union dues since the month the employees first joined the claimant is hereby dismissed".*

In as much, the situation here is different. The Respondents stopped deduction of union dues on the premises of a circular from the Chair, Council of Governors. This was despite prompting by the claimant and also the presence of subsisting Collective Bargaining Agreement which bound the parties to their duties under the contract. The respondents refusal and neglect to make union dues deductions amounts to breach of contract and wanton impunity.

Non deduction of union dues has always been used as a weapon to constrain union membership and activities. It is clearly a perverted labour relations exercise which must be discouraged for the sake of the work place. Viable industrial relations is a necessary tool for productivity and economic progress in any society. This inaction by the respondents must therefore be curbed by ensuring that employers who indulge in these malpractices are forced to bear the loss from their kitty. No silences of the law would force an otherwise situation. I therefore find that the claimant is entitled to the relief sought. This answers the 1st and 2nd issues for determination.

I am therefore inclined to allow the claim and order relief as follows;

1. An order be and is hereby issued quashing the circular dated 15th February 2019 REF: COG/6/40/1B Vol.6 (74) by the Chair, Council of Governors.
2. An order be and is hereby issued directing the 1st and 2nd Respondents to continue deducting and remitting union dues to the specified bank account and as scheduled in the Legal Notice No.160 of 2018.
3. A Declaratory Order declaring that Chairman of the Council of Governors has no mandate to issue any directives to the County Public Service Boards directing them not to deduct and remit trade union dues to the Claimant/Applicant.
4. An Order barring the Chair, Council of Governors, his agents, servants or representatives issuing circulars interfering with the membership of the Applicant/Claimant and on deductions and remittance of union dues unless as provided for under the law.
5. An order directing the Respondents to jointly pay from their own funds an amount of trade union dues in favour of the Claimant now amounting to Kshs.765,001.35 and any un-deducted and unremitted union dues for the Applicant/Claimant up to date.

6. An Order directing the 1st and 2nd Respondents to pay from their own funds an amount of trade union dues in favour of the Claimant un-deducted and unremitted union dues for the trade union dues from March to October, 2018 amounting to Kshs.2,400,000

7. An order directing the 1st and 2nd Respondent interest on the cumulative total of Ksh.2,4000,000 and ksh.765,001.35 at the court rate.

8. The Costs of the claim shall be borne by the Respondents.

**DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr.Tyson Kinoti for the Claimant/Union.

2. Mr.Kamau instructed by Mbugua Ng'ang'a & Company Advocates for the 2nd and 3rd Respondents.