



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E367 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

UNION OF KENYA CIVIL SERVANTS.....CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE1ST RESPONDENT

UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA.....2ND RESPONDENT

JUDGMENT

1. The claim herein was instituted by the Union of Kenya Civil servant, a duly registered trade union. The 1st Respondent is State Corporation established through the Science, Technology Amendment Act. The 2nd Respondent is a duly registered Trade Union under the provisions of the Labour Relations Act.

2. It is the Claimant's averment that during the year 2017 the 1st Respondent's staff members voluntarily on their own volition and without coercion joined the Claimant and thereafter terminated their membership with the 2nd Respondent.

3. It is further the Claimant's averment that the 1st Respondents staff members also executed the Claimant's authorization forms for deduction of monthly subscription fees for the Claimant and immediately ceased being members of the 2nd Respondent.

4. That the 1st Respondent despite being aware that its members had joined the Claimant and terminated their membership with the 2nd Respondent, continued to unlawfully deduct the agency fees in favour of the 2nd Respondent against the provisions of Section 48(6) of the Labour relations Act.

5. The Claimant avers that it raised the issue of illegal deductions with the 2nd Respondent but the same was ignored and the 1st Respondent continued to be deduct monthly subscriptions for its members twice yet it is unlawful for members to belong to two trade unions at a time.

6. In the memorandum of claim dated 5th August 2020 the Claimant seeks;

- a) *A declaration that unlawful and illegal deductions of Agency fees from the Claimant's members who are the 1st Respondent staff members in favour of the 2nd Respondent is unlawful since 2017 up to date contrary to the Constitution and the labour relations*
- b) *Cost of the suit*
- c) *Any other relief as the court may deem just*

7. Together with the Memorandum of Claim, the Claimant filed a notice of motion under certificate of urgency seeking the following orders:—

- (i) **THAT** *this application be certified urgent and admitted for hearing during the court vacation and be dispensed with in the first instance.*
- (ii) **THAT** *this court does issue a temporary injunction order against the 1st and 2nd Respondents to immediately cease any*

further deductions of the 'agency fee' from its staff who are legally members of the Applicant pending the hearing and determination of the main suit.

(iii) **THAT** this Court does issue an urgent inter-parties hearing for the determination of this suit.

(iv) **THAT** cost of this application be provided for.

8. The application is supported by the affidavit of **Jerry Ole Saoli**, the Deputy Secretary General of the Claimant and the grounds on the face thereof which are a reiteration of the facts pleaded in the Memorandum of claim.

1st Respondents case

9. In response to the application the 1st Respondent filed grounds of opposition and a replying affidavit sworn on 15th October 2020 by **Gachuhi Mungai** the Deputy Director of Human Resource for the 1st Respondent

10. In response to the memorandum of claim the 1st Respondent filed a response to the memorandum of claim dated 23rd October 2020.

11. The 1st Respondent averred that there is a subsisting Recognition Agreement and collective Bargaining agreement between the 1st Respondent and the 2nd Respondent for the benefit of its employees which the members of the Claimant continue to benefit from as non-members of the 2nd Respondent.

12. It further states that Section 49(1) of the Labour Relations Act mandates the 1st Respondent to deduct agency fees due from members of the Claimant and remit the same to the 2nd Respondent under the authority of the Cabinet Secretary of Labour, Social Security and Services in view of the subsisting Legal Notice 37 issued on 2nd April 2015.

13. It contends that union dues and agency fees as provided under the Labour Relations Act are distinct payments respectively made by members of a recognized trade union and unionizable non-members of the union benefiting from the terms of a CBA negotiated by the recognized trade union.

14. Further it states that all the employees of the 1st Respondent continue to benefit from terms negotiated by the 2nd Respondent and every unionizable employee who benefits must meet their fair share of representation.

15. It states that an employee who elects to join a union that is not recognized by their employer is obligated to pay agency fees for benefiting from the terms negotiated with their employer with the recognised Union on their behalf.

16. The 1st Respondent prays that the claim be dismissed with costs.

2nd Respondents case

17. In response to the application and the claim, the 2nd Respondent filed a replying affidavit and a statement of Response.

18. It states that it signed a collective bargaining agreement dated 25th August 2014 on the terms and condition of service of the 1st Respondents employees. Further that an order was issued by the Cabinet Secretary for Labour, Social Security and Protection for deduction of agency fees on 2nd April 2015.

19. Further it states that Section 49(5) of the Labour Relations Act allows the 1st Respondent to deduct and remit to the 2nd Respondent agency fees from the wages of an employee covered by its collective bargaining agreement.

20. The 2nd Respondent maintains that the Claimant's members are still benefiting from the collective bargaining agreement between the 1st Respondent and the 2nd Respondent is therefore obliged to deduct and remit the agency fees to the 2nd Respondent.

21. It contends that the Claimant is not a sector specific union therefore does not have mandate to represent employees within National Research Institute which is not recognized by the 1st Respondent and therefore is not the proper union to represent the employees of the 1st Respondent.

22. It further states that the Claimant is interfering with the trade union representation of the 1st Respondent's unionizable employees. It also claims that the Claimant's members have re-joined the membership of the 2nd Respondent who is lawfully receiving their union dues. It urges the court to dismiss the claim as the same is misguided, erroneous and not merited.

Claimant's Submissions

23. The Claimant submits that the staff members of the 1st Respondent voluntarily joined the Claimant and signed authorization forms in favour of deduction to the applicant and automatically ceased being members of the 2nd Respondent.

24. It submits that the monthly deductions being made from the 1st Respondent's staff members who are members of the Claimant in favour of the 2nd Respondent as "agency fees" are illegal, unlawful and has no basis in law.

25. The Claimant further submits that despite raising the issue that its members are being subjected to deduction of agency fees for two unions, the issue has been neglected. As such they suffer irreparable financial damages. That it seeks an injunction as the members have already terminated their membership with the 2nd Respondent.

26. It further submits that it is unlawful and illegal to deduct agency fees from the Claimant's members since they had duly notified the 1st Respondent of their change of trade union as provided for in the Labour Relations Act No. 4 of 2007 laws of Kenya.

27. Relying on **Article 41(2)(c)** of the Constitution of Kenya 2010 Laws of Kenya which provides that every workers has a right to form, join or participate in the activities and programmes of a trade union, the Claimant submits that forcing members to pay agency fees when they have terminated their membership with the 2nd Respondent is unconstitutional.

28. The Claimant further relies on Article 36(1) and (2) of the Constitution of Kenya 2010 which provides that: -

(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

29. It relies on the case of **Kenya Hotels and Allied workers union v Sunset Limited Hotel and KUDHEIA Workers (Interested Party) [2016] eKLR** where Wasilwa J. stated as follows:-

"19. There cannot be deduction of agency fees in the same vein when a person has opted for a union recognized by his employer and still have agency fees deducted to another union. This is double deduction which is a forced deduction for agency fees."

30. The Claimant submits that the Legal Notice Levying agency fees is not only unconstitutional and void, it violates the provisions of Articles 36(1 & 2) and Article 41(2)(c) of the Constitution of Kenya 2010 and relies on **Article 2(4) of the Constitution of Kenya 2010** provides that: -

(4) Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid.

31. It further submits that the legal Notice is overtaken by events as it is premised on a CBA which expired in July 2017.

32. The Claimant relies on the case of **Tailors and Textiles Workers Union v Global Apparels EPZ Limited; Fidelis Omwamba Onsongo & 6 Others (Proposed Interested Parties) [2019] eKLR** the court stated as follows: -

"27. It is thus clear that an employer cannot deduct union dues from a member who has resigned from the union. The union members write these resignations to their employer and the employer has the extra duty to notify the union by forwarding a copy of the notice of resignation to the trade union."

33. The Claimant prays that the memorandum of claim be allowed with costs.

1st Respondents Submissions

34. The 1st Respondent submits that the Claimant's suit is misguided by the notion that its members are subjected to double deductions in terms of trade union dues and agency fees.

35. It submits that the Labour Relations Act makes a clear distinction of trade union dues and agency fees. That Section 48(1) describes trade union dues as follows –

48. Deduction of trade union dues

(1) In this Part "trade union dues" means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

36. That on the other hand, Section 49(1) provides that;

(1) A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers' organization, setting terms and conditions of service for all unionizable 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 unionizable employee covered by the collective agreement who is not a member of the trade union.

37. The 1st Respondent relies on the case of **Amalgamated Union of Kenya Metal Workers v Unity Auto Garage (Nrb) Limited [2014] eKLR** which relied on **Cause No.1624 of 2013, Tailor and Textile Workers Union v New Wide Garments Kenya (EPZ) Limited** in stating as follows:

“Under the provisions of Section 48 and 49 of the Labour Relations Act, the law recognizes the fundamental role played by trade unions in securing employee gains with regard to negotiated agreements. These gains not only benefit the union members but also go beyond the union membership to other employees. Where there are benefits that are secured through the efforts of the representative trade union in collective bargaining and are passed on to other employees who are not members of the representative trade union such employees should make contribution towards the costs which the representative union incurs in connection with its collective bargaining work. If they do not pay that is unfair members of the representative union pay for those costs. An agency fees seeks to make them pay without compelling them to join the representative trade union. The fact that such workers may be members of another union in the work place to which they pay union dues does not turn them into paying riders. They remain free riders as they make no contribution towards the collective bargaining costs of the representative union.”

38. In **Amalgamated Union of Kenya Metal Workers v Unity Auto Garage (Nrb) Limited [2014] eKLR** there was a dispute about the nature and effect of the then Minister's directive contained in a Gazette Notice No. 14722. The Court held that the Respondent was bound to follow the orders as directed by the Minister and as published in the gazette notice pending any clarification or intervention sought from the Minister.

39. The 1st Respondent submits that the Legal Notice No. 37 issued on 2nd April 2015 is still valid and operational. It remains binding upon the 1st Respondent who must oblige by the directives in compliance with the law as is provided in Section 49(3) of the Act that:

(2) An employer in respect of whom the Minister has issued an order as specified in subsection (1) shall commence deducting agency fees from the employees named in the Minister's notice within thirty days of receiving the Minister's notice.

40. The 1st Respondent submits that the deduction of agency fees is not in contravention of Section 48(6) as alleged in the memorandum of claim. It submits that Section 48(6) seeks to prohibit double deductions of union dues from an employee who has resigned from one trade union and joined another.

41. The 1st Respondent prays that the claim and the application be dismissed with costs

2nd Respondents submissions

42. The 2nd Respondent submits that pursuant to Section 17 of the Employment Act an employer may deduct wages of its employees so far as the same is authorized by any written law, collective agreement, wage determination court order or arbitration award.

43. It further states that Section 49 of the Labour Relations Act mandates an employer to deduct agency fees from its unionisable employees covered by a collective bargaining agreement concluded by trade union they are not members to.

44. The Respondent relies in the case of **Rift Valley Railway Workers Union v Rift Valley Railways (Kenya) Ltd and Another [2014] eKLR** where the Court held that Agency fees is allowed under Section 49(1) of the Labour Relations Act as against unionisable employees who are not members of the union but are benefiting from a Collective Bargaining Agreement negotiated by the union on behalf of its members.

45. The Respondent urges this court to be guided by the principle outlined in the US Supreme court decision in **Communication Workers of America v Beck 487 U.S. 735 (1988)** quoted in the case of **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR** stating that those enjoying the benefits of union representation should contribute their fair share to the expenses of securing those benefits, and which is the case in the instant claim.

46. The 2nd Respondent submits that the purpose of agency fees is to compel non-union members who benefit from the union negotiated collective bargaining agreement to contribute to the cost of negotiating the collective Bargain agreement.

47. The 2nd Respondent avers that in the **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR**, the majority decision held that

“We also do not think that agency fees constitute interference with freedom of association as an employee paying agency fee to the union that negotiates the Collective Bargaining Agreement is not prohibited from joining any other union of his/her choice.”

48. The 2nd Respondent submits that pursuant to the CBA dated 25th August 2014 and the order of the Cabinet Secretary for Labour, Social Security and Protection order dated 2nd April 2015 the 1st Respondent lawfully remits the agency fees to the 2nd Respondent in line with Section 49 of the Labour Relations Act.

49. The 2nd Respondent further relies on the case of; **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR** where the court held that

“It is our opinion that it would not be fair for a union to negotiate for free riders. This would encourage members to withdraw from

membership as they would still benefit from the CBA without being members or paying any fee for the union's efforts and expenses for negotiating the CBA. It is also a fact that an employer cannot pay different wages to employees who are union members and those who are not. This would amount to discrimination and is prohibited by both the Constitution and the Employment Act."

59. It submits that it would be discriminatory for the union to charge its members dues for membership that is used to fund the collective bargaining agreement negotiations but charge nothing to non-members who benefit from the terms negotiated and funded by membership fees.

60. The 2nd Respondent submits that Section 48 of the Labour Relations Act provides for deduction of Union dues while Section 49 of the Labour Relations Act provides for deduction of Agency fees. Hence, the two are different deductions provided for by the Act.

61. It further submits that Agency fees is payable by a unionizable employee who is a non-member of a Trade union whose Collective Bargaining Agreement the unionisable employee benefits from.

62. It further submitted that the right to a collective bargaining agreement is provided for under Section 59 of the Labour Relations Act.

63. The 2nd Respondent also relied on the case of **Musa Mohamed Kaleve & 2 others v East African Portland and Cement Limited [2020] eKLR**, where the Court while interpreting Section 59(3) of the Labour Relation Act held that

"In my view, what subsection (3) means, is that even after the agreed period of the CBA lapses, the benefits granted to the individual employees under the CBA continues to be enjoyed."

64. The 2nd Respondent submitted that the terms in the Collective Bargaining agreement are incorporated in the Claimant's members' contracts which are still in force to date.

65. The 2nd Respondent relied on the case of **Kenya Aviation Workers Union v Bollore Africa Logistics – Kenya & another [2016] eKLR**, where the Court while answering the question when agency fees deduction should stop, held that:

"When should agency fees be deducted and when should such deduction stop in view of members being deducted such agency fees joining a new union or a union of their choice? Such indeed is a key question herein in view of the CBA between the Respondent and the interested party and the Recognition Agreement the Claimant has with the Respondent. Agency fee becomes due immediately the Minister has issued an order requiring an employer bound by a CBA registered by this Court. Such a deduction shall cease upon the Minister varying the order issued."

66. It further submits that the orders issues on 2nd April 2015 as per the Legal Notice 37 are still valid as the Legal Notice is yet to be varied or set aside.

67. The 2nd Respondent submits that there is no illegality and no right has been breached in deduction of the agency fees and further submits that since the Claimant's members continue to benefit from the CBA between the 1st Respondent and the 2nd Respondent they are obligated to pay Agency fees. As such it urges the court to dismiss the claim with costs.

Issues for Determination

68. I have carefully considered the pleadings and the submissions by the parties. The issue for determination is the legality of deduction of the agency fees from the Claimant's members in favour of the 2nd Respondent.

69. It is not disputed that the 1st Respondent and the 2nd Respondent entered into a collective bargaining agreement on 25th August 2014 for a duration of 4 years. The terms of the CBA were incorporated into the contracts of the 1st Respondents staff.

70. On the 2nd April 2015, the Cabinet Secretary for Labour, Social Security and Services issued a Notice cited as UNION OF NATIONAL RESEARCH INSTITUTE STAFF OF KENYA (DEDUCTION OF AGENCY FEES) ORDER, 2015. The Legal Notice stated that:-

2. *Kenya Medical Research Institute Shall:-*

a) Deduct on Monthly basis the sum specified in the schedule in respect of each unionisable employee who is not a member of the union of National Research staff of Kenya but is bound by the collective Bargaining Agreement (RCA 225 of 2014) signed between the union and the company on 17th October 2014

b) Commence deduction within 30 days of receiving this order, and

c) Remit within ten days, the sum deducted under item (a) by crossed cheque made payable to the unions account No. 234-793-836 at Kenya Commercial Bank Limited, Moi Avenue Branch, Nairobi;

SCHEDULE

A sum of three hundred and fifty shillings from each employee's basic wage per month."

71. Article 5(c) of the Collective Bargaining Agreement it provides for agency fee as follows:-

Agency fee: Since the union has an exclusive representation for collective Bargaining within KEMRI, all unionisable staff shall be liable to pay an agency fee/service fee equivalent to the rates currently paid as union dues monthly towards the maintenance of union as so far as his/her, class of employment remain unionisable.”

72. Section 48 of the Labour Relations Act No. 14 of 2007 provides as follows: -

48. Deduction of trade union dues

(1) In this Part “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted—

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade

(iii) union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee’s wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union.

73. Section 49(1) of the Labour Relations Act No. 14 of 2007 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.

74. Mbaru J. in **Kenya Aviation Workers Union v Bollere Africa Logistics - Kenya & another [2016] eKLR**, noted

“... It is therefore lawful for an employer to deduct an agency fees from the wages of an employee covered by a CBA, an employee who is not a member of the trade union. There exists a CBA registered before this Court in RCA No.14 of 2009. With such registration the Respondent and the interested party were bound by its terms and conditions. Pursuant to the registration of this CBA, I note the Minister published Gazette Notice No.5027 of 2009 giving effect to the applicable law. Contrary to the Claimant ’s submissions, I find no conflict with regard to the application of section 48 and 49 of the Labour Relations Act as one regulates the deduction of union dues while the other regulate the collection/deduction of agency fees.”

75. The Claimant has not attached resignation letters from the employees who have resigned from the 2nd Respondent and joined the Claimant as provided in Section 48(6), (7) & (8) of the Labour Relations Act.

76. Even if this was the case, the agency fees would still be payable for as long as the employees were benefiting from the CBA negotiated by the 2nd Respondent, until such a time that the Claimant would itself negotiate its own CBA and become entitled to agency fees. In such

eventuality, the Claimant would then be the one to charge agency fees against the 2nd Respondent's members benefiting from it CBA.

77. Agency fee is different from union dues as provided in Section 48 and Section 49 of the Labour Relations Act.

78. As provided in Section 59 of the Labour Relations Act, the CBA became part of the contracts of employment of everyone covered by it. Therefore even after the lapse of the agreed period the benefits granted to employees continues to be enjoyed. Section 59 provides as follows

59. Effect of collective agreements

(1) A collective agreement binds for the period of the agreement—

(a) the parties to the agreement;

(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.

(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association.

(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

(4) A collective agreement shall be in writing and shall be signed by—

(a) the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and

(b) the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary.

(5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

79. In the South African case of **Samwa City of Tshwane and Municipal Manager, City of Tshwane Case No. J877/13** the Labour Court of South African held that :

“[18] It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees' contract of employment. It is therefore my view that even though the 2006 collective agreement lapsed, its provisions having been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees' employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individuals' contracts.”

80. The CBA between the 1st Respondent and the 2nd Respondent has been registered and incorporated into the contracts of the 1st Respondent's employees contracts therefore they are liable to pay agency fee as provided under Section 49 of the Labour Relations Act, for as long as they are not members of the 2nd Respondent and are benefiting from the terms of its CBA.

81. For the foregoing reasons, I find that the agency fee does not amount to double deduction of Union dues as the same is authorised under Section 49 of the Labour Relations Act for as long as the employees enjoy the benefits of the negotiated CBA while they are not members of the 2nd Respondent.

82. The claim herein is therefore without merit and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JULY 2021

MAUREEN ONYANGO

JUDGE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE