



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 521 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**KEPHER OGUWI LANGI**

**CLAIMANT**

*VERSUS*

**KENYA UNION OF POST PRIMARY**

**EDUCATION TEACHERS (KUPPET)**

**1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF EDUCATION,**

**DEPARTMENT OF VOCATIONAL AND TECHNICAL TRAINING 2<sup>ND</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. By his statement of claim dated 9<sup>th</sup> August 2019, the Claimant seeks the following orders –

- a) A declaration that the consent Order entered between the Respondents and recorded as an order of the Court on 15<sup>th</sup> July, 2019 is unlawful, null and void*
- b) A declaration that no employer can effect any deductions of union dues unless the Form “S” duly signed by employee(s) has been received from the said trade union and validation as to its validity is ascertained*
- c) An Order to set aside the Consent Order dated 15<sup>th</sup> July, 2019*
- d) Any other relief which the court may deem fit to grant*
- e) Cost of the claim be provided for*

2. The Claimant is a Trainer and under Article 17(1) of the Constitution at the time of filing suit was engaged as a lecturer at Ramogi Institute of Technology.

3. The 1<sup>st</sup> Respondent is a trade union registered under the Labour Relations Act to represent teachers in post primary educational institutions.

4. The 2<sup>nd</sup> Respondent is the Principal Secretary, Vocational and Technical Training, Ministry of Education.

5. The 3<sup>rd</sup> Respondent is an independent commission established under Article 237(2) of the Constitution and is responsible for registration, employment, deployment and discipline of teachers employed in the public service.

6. The 4<sup>th</sup> Respondent is the legal advisor and attorney to the Government in all legal proceedings.
7. The Respondents are listed as parties in **Nairobi ELRC Petition No. 85 of 2018** and **ELRC Petition No. 97 of 2018**, which were thereafter consolidated. The Claimant had applied to be enjoined to the consolidated suit but his application was declined by the Court.
8. The Claimant was an employee of the 3<sup>rd</sup> Respondent until the enactment of the **Technical and Vocational Education and Training Act, No. 29 of 2013** which established a body responsible for the Employment of all trainers working as such in the Vocational and Technical Training Institutions in the public service. The Act took effect in July, 2018.
9. The Claimant states that he learned with dismay that the consolidated suits referred to above filed by some members of the 1<sup>st</sup> Respondent against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents was compromised by a consent order recorded and extracted on 15<sup>th</sup> July 2019 to the effect that all trainers in the employment of the 2<sup>nd</sup> Respondent had been taken over and had become members of the 1<sup>st</sup> Respondent.
10. It is the Claimant's averment that he was a member of the 1<sup>st</sup> Respondent "KUPPET" when he was in the employment of the 3<sup>rd</sup> Respondent "TSC". That he is no longer an employee of the 3<sup>rd</sup> Respondent "TSC" and consequently resigned from membership of the 1<sup>st</sup> Respondent "KUPPET".
11. The Claimant opines that he is aware that the 1<sup>st</sup> Respondent "KUPPET" represents teachers employed by the 3<sup>rd</sup> Respondent TSC. That since he is not an employee of TSC after his services were transferred to the Public Service Commission, he automatically ceased to be a member of the 1<sup>st</sup> Respondent "KUPPET".
12. It is the Claimant's averment that upon the transfer of his service by operation of the **Technical and Vocational Education and Training Act, No. 29 of 2013** from TSC to Public Service Commission, the 1<sup>st</sup> Respondent KUPPET ceased to be a representative union for Technical and Vocational trainers in the public service as provided under Section 54 of the Labour Relations Act. That the consent that he seeks to be nullified purported to make a collective decision on his behalf yet the 1<sup>st</sup> Respondent does not have a Recognition Agreement with the Public Service Commission, the 3<sup>rd</sup> Respondent. That the said consent is therefore unlawful and amounts to a judicial fraud.
13. It is further the Claimant's averment that in accordance with Section 19 of the Employment Act, other than statutory deductions as provided under the law, no other deductions can be made from wages of an employee without the authority of the employee. That the 3<sup>rd</sup> Respondent "Public Service" has not received such an authority from him to effect such a deduction.
14. The Claimant avers that a consent between the Respondents to effect any deductions from his wages in the absence of a duly filled and signed Form S in place in accordance with Section 48 of the Labour Relation Act, remain unlawful and not implementable.
15. That it is very clear from the **Technical and Vocational Education and Training Act No. 29 of 2013**, that the Claimant did not participate in any Collective Bargaining Agreement with the 1<sup>st</sup> Respondent "KUPPET" and that the Petitioner (KUPPET) in ELRC Petition No. 85 of 2018 needed to register more than ½ of the trainers for it to qualify to enter into a recognition agreement with the Ministry of Education.
16. That under Articles 22(1), 41, 47, 232, 237 of the Constitution of Kenya, the Claimant has a legal right to authorize which trade union should represent him.
17. The Claimant avers that it would be in the interest of justice for this court to set aside the said consent order.
18. None of the Respondents filed a defence to the claim.
19. By an application dated 5<sup>th</sup> May 2020, the Claimant further seeks the following orders –
  - (1) Spent.
  - (2) THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant conservatory orders restraining the 2<sup>nd</sup> Respondent from deducting, taking and or transferring any monies whether union dues or Agency fees to the 1<sup>st</sup> Respondent from the Trainers/Lecturers who have resigned from the 1<sup>st</sup> Respondent.
  - (3) THAT pending the hearing and determination of this Petition, this Honourable Court be pleased to grant conservatory orders the 2<sup>nd</sup> Respondent from deducting, taking and or transferring any monies whether union dues or Agency fees to the 1<sup>st</sup> Respondent from people who has resigned from the 1<sup>st</sup> Respondent.
  - (4) THAT pending the hearing and determination of this petition this Honourable, Court be pleased to grant an order directed to the 2<sup>nd</sup> Respondent to refund all the monies so far illegally deducted whether Union dues or Agency fees.
  - (5) THAT pending the hearing and determination of this petition this Honourable, Court be pleased to grant an order directed to the 2<sup>nd</sup> Respondent stopping prohibiting, entering, signing, executing or in any contracting a Recognition Agreement with the 1st Respondent.

(6) THAT this Honourable Court be pleased to make such orders as it deems necessary to safe guard the ends of justice.

(7) THAT costs of and incidentals to this application be provided for

20. By directions issued on 17<sup>th</sup> December 2020, the Court ordered that the application be disposed of together with the claim to save on judicial time and resources. The Court further directed the Respondents to file their responses within 7 days and thereafter, parties to file and exchange written submissions. The suit was fixed of mention on 19<sup>th</sup> July 2021 to take date for judgment.

21. When the suit was mentioned on 19<sup>th</sup> July 2021, only the Claimant and Counsel for the 3<sup>rd</sup> Respondent confirmed compliance. Ms. Akello for the 1<sup>st</sup> Respondent promised to file by close of day while Mr. Kioko for the 2<sup>nd</sup> and 4<sup>th</sup> Respondent promised to file by close of the following day, that is on 20<sup>th</sup> July 2021. Ms Akelo later filed her submissions dated 15<sup>th</sup> July 2021. No other submissions are on record.

22. In the 1<sup>st</sup> Respondent's submissions dated 15<sup>th</sup> July 2021, it sets out two issues for determination being whether the prayers sought by the Claimant are capable of being granted and the effect of the application in the consolidated Petition No. 97 of 2018 and 85 of 2018 pending before this Court with respect to the consent.

23. For emphasis the 1<sup>st</sup> Respondent relies on the decision in case of **S M N v Z M S & 3 others [2017] eKLR**. The Court declined to set aside a Consent for the reason that the party seeking the said setting aside had failed to prove the alleged fraud and or collusion.

24. The 1<sup>st</sup> Respondent also relied on the case of **Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd [1982] KLR 485**, where Harris, J held, inter alia, that:-

*"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. 2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."*

25. It is the submission of the 1<sup>st</sup> Respondent that the Claimant was not party to the consent and does not meet the legal or contractual threshold to cause the variation or setting aside of the consent.

26. It is further the submission of the 1<sup>st</sup> Respondent that it had filed an application to set aside the consent in the consolidated suit which was filed earlier, rendering the said suit nugatory.

27. The 1<sup>st</sup> Respondent also accuses the Claimant of material non-disclosure and relies on the case of **Barclays Bank of Kenya Ltd v Elizabeth Aqidza & 2 Others [2012] eKLR** the court held that:

*"... if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties ..."*

28. The 1<sup>st</sup> Respondent concludes that the orders sought are incapable of being granted, that the proper parties to the consent are pursuing the setting aside of the same and that the Claimant approached the Court with unclean hands and therefore does not deserve the order sought.

29. For the 3<sup>rd</sup> Respondent it is submitted that the Claimant has not raised any justifiable issue against the 3<sup>rd</sup> Respondent and further that the 3<sup>rd</sup> Respondent is not a necessary party to the suit herein. The 3<sup>rd</sup> Respondent prays that it be discharged from these proceedings.

30. It relies on the case of **DT Dobie & Co (K) Ltd v Muchina, [1982] KLR**, where the Court of Appeal when interpreting Order VI Rule 13 (1) of the repealed Civil Procedure Rules which is the equivalent of the current Order 2 Rule 15 defined the term "reasonable cause of action" to mean –

*"an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer...."*

31. The 3<sup>rd</sup> Respondent further relied on the case of **Lucy Nungari Ngigi & 128 Others v National Bank of Kenya Limited & Another [2015] eKLR** where the Court stated as follows when considering whether to grant leave to enjoin a party:

*"Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact*

would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”

### **Analysis and Determination**

32. Having considered the pleadings and submissions the issue for determination are whether the Claimant is entitled to an order setting aside the consent dated.

33. As stated by the Claimant in the pleadings he has filed herein, all trainers in public Technical and Vocational Institutions were engaged by Teachers Service Commission (TSC), the 3<sup>rd</sup> Respondent herein and were therefore qualified to join membership of Kenya Union of Post Primary Education Teachers (KUPPET), the 1<sup>st</sup> Respondent herein.

34. Upon enactment of the Technical and Vocational Education and Training Act No. 29 of 2013, the technical and vocational institutions were moved to the Ministry of Education, Science and Technology. The payroll for the said staff was also moved to the Department of Technical and Vocational Educational Training.

35. Upon the transfer, the trainers who were members of KUPPET resigned from the Union as in their opinion, KUPPET was not longer the relevant and/or appropriate Union for them.

36. In **Petition No. 97 of 2018 between Rose Chege & 4 others v Teachers Service Commission & 3 others** as consolidated with **Petition No. 85 of 2018 between KUPPET v Teachers Service Commission & 3 others** the Court quashed the letter from the Secretary/Chief Executive Officer of Teachers Service Commission, the 3<sup>rd</sup> Respondent informing trainers of the decision to transfer them to the Ministry of Education, State Department of Vocational and Technical Training Institutions with effect from 1<sup>st</sup> July 2018.

37. It is on record that the Claimant herein applied to be enjoined in the consolidated petition but his prayers were declined. That is the reason he filed the instant suit.

38. His case is that he has resigned from membership of KUPPET, the 1<sup>st</sup> Respondent and has not joined the membership of any other union. He has further not authorised the deduction of his salary by the current employer and remittance thereof to the 1<sup>st</sup> Respondent KUPPET.

39. These facts are not contested by the Respondents.

40. The consent order that the Claimant wishes to be set aside states as follows –

#### **“CONSENT ON EXECUTION OF THE JUDGMENT DELIVERED ON 1<sup>ST</sup> MARCH, 2019**

*a) Whereas a judgment was delivered by Honourable Justice J N Abuodha on 1<sup>st</sup> March, 2019;*

*b) Whereas The Attorney General, the Ministry of Education and Public Service Commission being dissatisfied with the honourable court’s judgment preferred to appeal against the said judgment: and*

*c) Whereas The Attorney General obtained orders of stay of execution of the judgment and the decree flowing from the judgment given on 1<sup>st</sup> March, 2019 by Hon. Justice Abuodha on 14<sup>th</sup> March, 2019,*

*It is hereby agreed and by consent parties have agreed on the following compliance roadmap:*

*1. THAT the orders of stay of execution of the judgment and the decree issued by the Hon. Byram Ongaya J. on 14<sup>th</sup> March, 2019 staying the execution of the judgment and decree flowing from the judgment given on 1<sup>st</sup> March, 2019 by Abuodha J. to remain in force;*

*2. THAT the Cabinet Secretary for Education to sanction amendments to the Technical and Vocational Education Training (TVET) Act to provide among others the employing authority;*

*3. THAT the Ministry of Education to enter into a Recognition Agreement with KUPPET;*

*4. THAT the current employer of trainers do immediately recover and remit union dues and agency fees to KUPPET;*

*5. THAT the TVET Authority to advise on a harmonized scheme of service for the trainers;*

6. THAT the five (5) individual petitioners/trainers currently under the TSC to remain under TSC during the transition period; and

7. THAT parties to periodically update the court on the progress of the amendments to the TVET Act.

41. What the parties agreed on was completely outside the orders in the judgment that they alleged to have been implementing using the judgment as a basis for the consent.

42. Further, the consent goes against the freedom of association of every employee enshrined in Article 36 of the Constitution and the right of every worker to join or participate in the activities and programmes of a trade union of his choice under Article 41 of the Constitution.

43. The consent further offends the freedom of an employee to join and leave a trade union at will as provided in Sections of 4(1) of the Labour Relations Act which provide that –

**4. Employee's right to freedom of association**

**(1) Every employee has the right to—**

**(a) participate in forming a trade union or federation of trade unions;**

**(b) join a trade union; or**

**(c) leave a trade union.**

44. The agreement further offends Section 48 of the Labour Relations Act which provides for deduction of Union dues only from employees who have signed Form S (check off form) signifying their consent for the employer to deduct union dues from their salary and remit to the employer.

45. It also offends Section 54 of the Labour Relations Act which provides for recognition of a trade union upon attaining simple a majority membership.

46. The averment of the 1<sup>st</sup> Respondent that the deduction was in respect of agency fees is invalid as there was no collective agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> or 4<sup>th</sup> Respondents that the Claimant was benefiting from to justify deduction of agency fees from his salary and remittance thereof to the 1<sup>st</sup> Respondent as provided in Section 49 of the Labour Relations Act. Further, there is no order authorising the deduction of agency fees in terms of Section 49 of the Act.

47. The deductions made from the salary of the Claimant and all the other parties that he represents who had also resigned from the membership of the 1<sup>st</sup> Respondent or who had been transferred to the 2<sup>nd</sup> Respondent was thus a violation of Section 19(1) of the Employment Act and is recoverable from the 2<sup>nd</sup> Respondent.

48. For the foregoing reasons, I make the following orders: -

**(i) A declaration be and is hereby issued that the consent order entered between the Respondents and recorded as an order of the Court on 15<sup>th</sup> July, 2019 in Petition No. 85 of 2018 as consolidated with Petition No. 97 of 2018 is unlawful, null and void**

**(ii) A declaration be and is hereby issued that no employer can effect any deductions of union dues unless the Form "S" duly signed by employee(s) has been received from the said trade union and validation as to its validity is ascertained**

**(iii) That the consent dated 15<sup>th</sup> July 2019 be and is hereby set aside as it violates the rights of the Claimant and all the persons on whose behalf, he filed this claim to freedom of association and fair labour practice under Articles 36 and 41, Sections 19 of the Employment Act and Sections 4, 48, 49 and 54 of the Labour Relations Act.**

**(iv) That the Respondents do stop forthwith the deduction of union dues from the salary of the Claimant and the persons on whose behalf he filed this claim as set out in the list attached to the claim.**

**(v) That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents each refunds any monies deducted from the salaries of the Claimant and the persons on whose behalf he filed this suit and remitted to the 1<sup>st</sup> Respondent on account of union dues or agency fees after the date they ceased to be employees of the 3<sup>rd</sup> Respondent.**

**(vi) The 1<sup>st</sup> Respondent shall pay costs to the Claimant which I assess at Kshs.30,000/- to cover reasonable expenses and disbursements incurred in respect of these proceedings.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF DECEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**