



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 112 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 41(2), (4), (5) AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF THE LABOUR RIGHTS

SECTIONS 48(2)(a), (b) AND 50(1) OF THE LABOUR RELATIONS ACT, 2007

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION.....PETITIONER

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE

AND TECHNOLOGY.....1ST RESPONDENT

UNIVERSITY OF NAIROBI.....2ND RESPONDENT

MOI UNIVERSITY.....3RD RESPONDENT

THE TECHNICAL

UNIVERSITY OF KENYA.....4TH RESPONDENT

KISII UNIVERSITY.....5TH RESPONDENT

EGERTON UNIVERSITY.....6TH RESPONDENT

KENYATTA UNIVERSITY.....7TH RESPONDENT

JUDGMENT

The Petitioner has a recognition agreement and has negotiated several CBAs with the Respondents through their employers' federation: Public University Councils Consultative Forums.

The Petitioner instituted this petition on 2nd July 2019 to challenge the Respondents' alleged failure to remit union dues and agency fees. The petition is supported by the affidavit of Dr. Constantine Wasonga sworn on 27th June 2019. The following reliefs have been sought in the suit

a. Kshs.123,087,993.95 as outlined in paragraph 8 of the Petition.

b. An order compelling the Respondents to remit monthly union dues and agency fees to the Petitioner deducted from all members of the union in accordance with section 50 of the Labour Relations Act.

c. That the Court does issue a declaration that the Respondents are in breach of the Petitioner's right under article 41 of the Constitution and the Labour Relations Act.

d. Damages for breach of the Petitioner's constitutional rights.

e. Any other further order the Court may deem fit to grant in the circumstances.

f. Costs of the suit.

The Petitioner's Case

The Petitioner avers that the Respondents have failed to remit monthly union dues and agency fees yet they have deducted the same from their employees. That this is despite being issued with several reminders to remit the same. The Petitioner avers that the failure to remit the same has constrained it financially therefore hindering its activities and ability to offer services to its members.

The Petitioner avers that at the time of filing the Petition, the Respondents owed Kshs.123,087,993.95 in unremitted dues and agency fees computed as follows-

a. 1st Respondent – Kshs.12,925,310.40 for December 2018 and from January to May 2019.

b. 2nd Respondent – Kshs.24,740,774.00 for December 2018 and from January to May 2019.

c. 3rd Respondent – Kshs.8,898,468.00 from February to May 2019.

d. 4th Respondent – Kshs.39,504,097.05 for April, May, July to December 2015; January to April, July to December 2016; January to October and December 2017, January to June, September and December 2018, and January to May 2019.

e. 5th Respondent – Kshs.1,314,456.00 for April to May 2019.

f. 6th Respondent – Kshs.7,517,941.50 for January to May 2019.

g. 7th Respondent – Kshs.29,186,947.00 for July to December 2018 and January to May 2019.

The Petitioner avers that the Respondents' failure to remit union dues and agency fees is illegal, *ultra vires* and violates its rights under Article 41(2), (4) and (5) of the Constitution as the Petitioner is unable to engage in and administer union activities. Further, its right to fair administrative action has been violated since the Respondents are required to administratively remit union dues and agency fees within 10 days of deducting the same from union members.

The Petitioner urges that the Respondents ought to be compelled to remit its members union dues and agency fees as it is in the public interest.

The Respondents' Case

In the 4th Respondent's Replying Affidavit sworn by Ben Sanda on 26th August 2019, it is averred that the Petitioner instituted Petition 39 of 2018 to which the 4th Respondent was a party. The violations alleged herein were also outlined in that petition which was unsuccessful. Further, the affiant contends that the Petitioner has failed to adduce evidence to demonstrate how articles 41 and 47 of the Constitution have been violated by the 4th Respondent.

The 4th Respondent avers that it has always remitted union dues and agency fees and any amount due was settled according to the agreed modalities of settling outstanding sum. It is contended that the Petitioner has not demonstrated how the amount claimed was arrived at.

It is the 4th Respondent's case that it is committed to paying the outstanding union dues and agency fees and the reason for the delay is the uncertainty with which it receives money from the government. It is averred that for an order of mandatory injunction to be issued, special circumstances must be demonstrated and a *prima facie* case established.

In the 5th Respondent's Replying Affidavit sworn by Seth Ong'uti on 2nd August 2019, it is averred that there is misjoinder of parties as the cause of action did not arise jointly or from the same transactions. He further avers that the Petitioner has failed to indicate which of the members' subscription fees and agency fees, the 5th Respondent has failed to remit. It is averred that the 5th Respondent has never received the demand of Kshs.1,314,456.00. It contends that the Petitioner was paid Kshs.1,345,677.00 for the periods in question, which is in excess of the amount demanded.

It is the position of the 5th respondent that the Petitioner has not demonstrated compliance with Section 49 of the Labour Relations Act to warrant a claim against the 5th Respondent. That as such, no case has been made against the 5th Respondent hence the petition should fail.

In its grounds of opposition filed on 8th October 2019, the 6th Respondent contends that the petition is incurably defective, incompetent, bad in law and an abuse of court process as the Petitioner has not pleaded the elements of constitutional breach with specificity, particularity and precision.

The 6th Respondent contends that this Court lacks jurisdiction as no privity of contract has been demonstrated between it and the Petitioner. It is further contended that the Petitioner has moved this court through a procedure whose factual circumstances does **not allow**.

In the 7th Respondent's Replying Affidavit sworn by Prof. Fatuma Chege on 9th August 2019, it is contended that the 7th Respondent has not denied its employees the enjoyment of their rights under Articles 41 and 47 of the Constitution.

The affiant contends **that the 7th Respondent has been remitting union dues intermittently because of the financial constraints** it was experiencing. The 7th respondent further avers that the Petitioner ought to give a breakdown on how the claim was arrived at since it has not been particularized.

The 4th, 5th, 6th and 7th Respondents contend that the Petitioner has not demonstrated any contravention of its constitutional rights under threat hence the petition is defective and an abuse of the Court process. Further, the 7th Respondent avers that the issues raised in the petition could have been sufficiently determined in a claim brought under the Labour Relations Act.

The Petition was disposed of by way of written submissions. On 23rd October 2019, the claimant withdrew the claims against the 2nd, 3rd, 5th and 6th Respondents and only the issue of costs remained as against them for determination. The 2nd respondent having agreed

to pay the petitioner's costs.

The Petitioner's Submissions

In its submissions filed on 28th August 2019, the Petitioner submits that it is in the interest of justice that the Respondents be compelled to remit union dues and agency fees of its members since it is their obligation to do so.

The Petitioner submitted that though the 7th Respondent adduced evidence to prove that it remitted union dues, the 7th Respondent has not yet settled the entire amount. The Petitioner relies on the cases of **Aviation Workers Union v Kenya Airports Authority & Another [2019] eKLR** and **Kenya Engineering Workers Union v Jokali Handling Services Limited [2017] eKLR**, to fortify its case.

In its further submissions filed on 4th November 2019 on the issue of costs, the Petitioner submits that only the 2nd Respondent agreed to pay the costs of the suit but on the lower scale. It is submitted that the 3rd, 5th and 6th Respondent should bear the costs of the suit, for failing to deduct and remit union dues and agency fees thereby necessitating the filing of this petition.

It is further submitted that the said Respondents only paid the Petitioner's dues after the petition had been filed. The Petitioner urged this court to consider the steps taken by the parties herein in order to appreciate the trouble taken by the Petitioner to file this Petition. The Petitioner relied on the cases of **Morgan Air Cargo Limited vs. Everest Enterprises Limited [2014] eKLR** and **Ethics and Anti-Corruption Commission vs. Nderitu Wachira & 2 Others [2016] eKLR** where it was held that the Court has the discretion to award costs and that costs follows the event.

The Respondent's Submissions

In its submissions filed on 7th November 2019, the 4th Respondent submits that the petition does not meet the threshold for filing a constitutional petition hence should be dismissed. The 4th Respondent further submits that the proper procedure to be followed is the one laid down in section 75 of the Labour Relations Act.

It is submitted that the issue of deliberately avoiding to pursue a statutory remedy by invoking the Constitution is not an issue of technicality and constitutes an abuse of the Court process. It relies on the case of **Joanes Okotch v Hilton Kenya Limited [2007] eKLR** where the Court was of the view that an attempt to enforce contractual and commercial claims under the constitution is an abuse of the constitutional jurisdiction and process.

The 4th Respondent concludes by submitting that the Petitioner is not entitled to the damages sought for failing to prove the specificity of the 4th Respondent's constitutional breach. Further, that the authorities relied upon by the Petitioner regard recognition agreements and not the issue before this Court.

In its submissions filed on 31st October 2019, the 5th Respondent submits that it is entitled to costs of the suit having paid the Petitioner an amount in excess of what is sought for the periods in issue. That in the alternative, the court can direct each party to bear their own costs. The 5th Respondent relies on the case of **Ismail Hassan Abdullahi v Kenya Ports Authority [2013] eKLR** where the Court observed that costs do not follow the event in the Industrial Court unlike in the proceedings under the civil procedure regime as it has the discretion to make an order for costs that it considers just.

In its submissions filed on 20th September 2019, the 7th Respondent submits that it has remitted union dues and agency fees and should not be penalized for the sums which have not been tabulated. The 7th Respondent further submits that the Petitioner ought to provide an

arithmetic breakdown of how the sum claimed against the 7th Respondent was arrived at.

It is the 7th Respondent's submissions that the Petitioner has failed to show how it has violated the rights of the Petitioner's members to form a union of their choosing as provided for under Article 41. As such, the Petitioner is not entitled to damages for constitutional breach.

Analysis and Determination

I have carefully considered the pleadings filed by the parties; the evidence adduced before this court as well as the submissions. The issues before this court for determination-

- a. Whether the Petition raises constitutional questions.
- b. Whether the 1st, 4th and 7th Respondents failed to remit union dues.
- c. Whether the Petitioner is entitled to the reliefs as against the said Respondents.
- d. Who amongst the Petitioner and the 3rd, 5th and 6th Respondents is entitled to costs of this suit?

The Petition

The Respondents have submitted that the Petition does not meet the threshold for a constitutional petition and does not raise constitutional issues. The issue before this Court is the failure by the Respondents to remit union and agency fees having deducted the same from the members of the union in their employment. The Petitioner avers that this was a violation of its fundamental rights and freedoms as provided for under Article 41(2), (4) and (5) as it was unable to engage in union activities and article 47 that required the Respondents to administratively remit union dues and agency fees.

Article 41(2), (4) and (5) provides as follows-

(2) Every worker has the right—

- (a) to fair remuneration;**
- (b) to reasonable working conditions;**
- (c) to form, join or participate in the activities and programmes of a trade union; and**
- (d) to go on strike**

(4) Every trade union and every employers' organisation has the right—

- (a) to determine its own administration, programmes and activities;**
- (b) to organise; and**
- (c) to form and join a federation.**

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

On the other hand, Article 47 of the Constitution provides as follows-

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

In the submissions of the petitioner filed on 28th August 2019, it submits that the Respondents have a duty to deduct monthly subscriptions as union dues and agency fees from its members and remit the same to the Petitioner forthwith in accordance with Section 50 of the Labour Relations Act, 2007 and in any case within 10 days of the deductions being made.

The Petitioner submits that contrary to the Labour Relations Act 2007, the Recognition Agreement and Collective Bargaining Agreement currently in force between the Respondents and the Petitioner, the Respondents have failed to remit to the Petitioner the members' monthly union dues/subscriptions and agency fees which the Respondents have already deducted from its members, to the Petitioner's designated accounts.

The Petitioner submits that it has been financially constrained to offer the much needed services to its members and that the Respondents'

actions has jeopardized the smooth running of the Union which is contrary to the Labour Relations and the Constitutional Rights under Article 41 of the Constitution of Kenya, 2010.

The Petitioner submits that despite several reminders to the Respondents to remit the same, the Respondents have refused, neglected and or delayed to remit to the Petitioner its member's subscriptions and agency fees that they have already deducted from the Petitioner's members with no justifiable reason or cause.

The Petitioner submits that failing to remit its members' subscriptions and agency fees the respondents have already deducted from the members is illegal, ultra-vires and amounts to breach of the Petitioner's Constitutional Rights as contained in Articles 41(2), (4) and 47 of the Constitution of Kenya, 2010.

The Petitioner submits that it is aggrieved in that the Respondents' failure or refusal to remit its members' subscriptions and agency fees that they have already deducted from the members has caused financial strain to the Union to financial difficulties contrary to Article 41 of the Constitution and in violation of the Labour rights as expressed in the Labour Relations Act, 2007.

The Petitioner further submits that the Respondents have violated the Petitioner's constitutional rights as follows; -

a) Breach of Article 41(2), (4) and (5) of Labour Relations Act

That the Respondents are infringing upon the rights of all University

Academic Staff Union and its members from exercising their right to engage and administer the activities of the Union by failing to remit to the Petitioner the members' union dues and agency fees which they have already deducted from the Members of the Union.

b) Breaches of Article 47 of the Fair Administrative Action Act

The Respondents have infringed upon the Petitioner's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as the Respondents are required by Law to administratively remit to the Petitioner the union dues and agency fees within 10 days of deducting the same from the union members.

Particulars of Labour Relations violations by the Respondents

a) Breach of Section 48 (2) (a) and (b) of the Labour Relations Act, 2007 – Deduction of trade union dues

The Respondents have failed and or ignored to remit all the monies as they have deducted from all members of the Petitioner's Union contrary to the Labour Relations Act.

b) Breach of Section 50(1) of the Labour Relations Act, 2007 – General provisions applicable to deductions

The Respondents have failed to remit the amounts deducted from the members of the union contrary to the provisions of Law which expressly provides that any amount deducted in accordance with the said provisions shall be paid into the designated trade union account, or employers' organization account within ten days of the deduction being made.

In *Anarita Karimi Njeru v Republic* [1979] KLR 154 the Court of Appeal stated –

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

I would agree with the respondents that the petitioner has not demonstrated the violation of Article 47 as failure to pay union dues and agency fees does not amount to an administrative action.

“Administrative action is defined in Black's Law Dictionary Tenth Edition as “a decision or an implementation relating to the government's executive.”

Failure to remit union dues and agency fees would not qualify to be termed administrative action. It is more in the nature of a default to comply with a legal obligation as the right of the union to receive union dues through the employer is provided for under the Labour Relations Act.

However, I would agree with the petitioner that by failing to remit union dues, the respondents infringed on the petitioner's and its members' rights under Article 41(4) as the rights enshrined therein can only be realised with funds from the membership. Without funding, a union's activities would be crippled. It would thus not be able to organise, or to manage its administration, programmes and activities, or even to collectively bargain as all these activities are funded by membership subscriptions and agency fees.

I thus find that by depriving the petitioner of funds collected from its members for remittance to the petitioner, the respondents violated the petitioner's rights under Article 41. I further find that this has been properly set out in the petition and affidavits in support thereof with sufficient precision for the respondents to properly respond thereto.

Union Dues and Agency Fees

It is the Petitioner's case that the 1st, 4th and 7th Respondents failed to remit union dues and agency fees. The 1st Respondent did not put in a response. The 4th Respondent contended that it has always remitted union dues and agency fees and any amount due was settled according to the agreed modalities of settling outstanding sums. On its part, the 7th Respondent contended that its remittances were made intermittently due to the financial constraints it was experiencing.

The 1st respondent having not responded to the petition, the petitioner's averments against it are uncontroverted.

With respect to the 7th respondent there is admission at paragraph 6 of the replying affidavit that the remittances of union dues was intermittent, meaning that there was no compliance with Section 48 and 49 of the Labour Relations Act in relation to timelines for remittance of union dues and agency fees.

Reliefs

1st Respondent

The 1st respondent having not contested the averments in the petition, judgment is entered against it in favour of the petitioner in the sum of **Kshs.12,925,310.40 as prayed with costs.**

2nd Respondent

The 2nd respondent admitted being indebted to the petitioner and **agreed to remit the outstanding sum and to pay costs.** No further orders are made against the 2nd respondent.

3rd Respondent

The 3rd respondent paid the outstanding union dues and agency fees and the petition against it was withdrawn. The only outstanding issue is costs. Although the petitioner states that payment was made after the suit was filed, no evidence has been submitted to prove the same. I therefore make no orders for costs against the 3rd respondent.

4th Respondent

The 4th respondent filed a replying affidavit wherein it has set out the payments made at the table at paragraph 10 thereof. The table reflects that payments in the sum of Kshs.2,424,313.85 were made on 16th August 2019 after the filing of the suit herein. This is proof that it failed to make remittances as required by law.

The 4th respondent will therefore pay the petitioner's fees in addition to making remittances of any outstanding union dues and agency fees.

5th Respondent

The suit against the 5th respondent was withdrawn after it made payments of outstanding union dues and agency fees. In the relying affidavit of Seth Ong'uti, he states that payment for April and May 2019 which is what was claimed in the petition, were made before the filing of the claim. This is not contested by the petitioner. There shall therefore be no orders for costs against the 5th respondent.

6th Respondent

The claim against the 6th Respondent was likewise withdrawn and the only issue for determination is in respect of costs. There is no evidence of the dates when the 6th Respondent paid the outstanding union dues. The petitioner having not proved that the same was paid after filing of the petition, I find no justification to order payment of costs by the 6th respondent. I thus make a finding that the petition as against the 6th respondent stands withdrawn with no orders for costs.

7th Respondent

The 7th respondent admitted to paying the union dues intermittently. In the submissions, the petitioner admits that upon being served, the 7th respondent started making payments but by the time of filing of the petitioner's submissions had not made full remittance.

I thus order that the 7th Respondent shall pay costs of the petition as against it in addition to any outstanding union dues and agency fees.

All fees shall be based on lower scale.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JUNE 2020

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, the court has 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 the 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