



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 387 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> February, 2016)**

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

**VERSUS**

**HON. SAMUEL KAMBI KAZUNGU**

**(CABINET SECRETARY, MINISTRY OF LABOUR,**

**SOCIAL SECURITY AND SERVICES.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**UNION OF KENYA CIVIL SERVANTS .....3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY FOR HEALTH .....4<sup>TH</sup> RESPONDENT**

**COUNCIL OF GOVERNORS .....5<sup>TH</sup> RESPONDENT**

**RULING**

1. On 16.3.2015, the Claimant Union filed their Memorandum of Claim through the firm of Eshiwani Ashubwe and Company Advocates where they state that the issue in dispute is:

***“in the matter of the gazettelement of Agency Fees by the Cabinet Secretary, Ministry of Labour (Hon. Samuel Kazungu Kambi) from ALL SERVANTS in favour of the Union of Kenya Civil Servants, Labour Relations Act, 2007, Section 49, Section 19(1) (f), (4) of the Employment Act, 2007”.***

2. The 1<sup>st</sup> Respondent herein is the Cabinet Secretary, in charge of Labour and Social Services. The 2<sup>nd</sup> Respondent is the Hon. the Attorney General of the Republic of Kenya sued on behalf of the Government. The 3<sup>rd</sup> Respondent is the Trade Union in favour of whom the said agency fees is to be deducted in favour of. The 4<sup>th</sup> Respondent is the Cabinet Secretary in charge of Health and Employer of Nurses, Members of the Claimant Union herein. The 5<sup>th</sup> Respondent is the Council of the Governors with full mandate to manage the affairs of the County Governments including employing the members of the Claimant Union whose services have been deployed to the Counties.

3. The Claimant draws its membership from the nursing profession, who are employed in both private and public sectors within the Republic of Kenya.

### **Claimants case**

4. The Claimants have stated that they have members employed in both the Central Government and County Governments. They aver that they have completed negotiating for a CBA with the Government of Kenya which is awaiting signatures of the parties.

5. The Claimants aver that the 3<sup>rd</sup> Respondent purports to have negotiated some benefits for Civil Servants which negotiations are based on an unknown CBA. That there is an existence, communication from the SRC to the Courts that all CBAs at that time expired on 30/6/2013 to allow room for new CBAs with a four year review period.

6. They contend that despite the above position, on 20<sup>th</sup> February 2015, the 1<sup>st</sup> Respondent herein, gazetted an order directing all employers to implement the deductions and payment of agency fees towards the Union of Kenya Civil Servants, the 3<sup>rd</sup> Respondent herein.

7. On 6<sup>th</sup> March 2015, the Claimant Union wrote to 1<sup>st</sup> Respondent asking him to unconditionally and urgently withdraw the Kenya Gazette Supplement No. 19 in respect of deductions of agency fees from Public Servants who had benefited from the negotiated CBA (Annex KNUN 6 of 6<sup>th</sup> March 2015). The 1<sup>st</sup> Respondent ignored and neglected to respond to the Claimants letter of 6.3.2015.

8. The Claimant aver that the 4<sup>th</sup> and 5<sup>th</sup> Respondents being employers of the Claimant's members have been directed vide Gazette Supplement No. 19 of 20.2.2015 to effect deductions of agency fees to the entire public service including members of the Claimant Union.

9. The Claimant submits that their members have never been involved and/or instructed the 3<sup>rd</sup> Respondent to negotiate a CBA with the Government on their behalf.

10. The Claimant submit that implementation of the deduction of agency fees upon their members would expose them to huge economic suffering and create confusion and pandemonium in the Union and Labour Industry at large.

11. They aver that this would go against the spirit of Section 4(1) of Labour Relations Act and Article 41 of the Constitution which gives their members a right to join or leave a trade union.

12. The Claimant aver that their members have never benefited from the alleged CBA in Kenya Gazette Supplement No. 19 of 20<sup>th</sup> February 2015 and they contend that the 4<sup>th</sup> and 5<sup>th</sup> Respondents are likely to implement the deductions of agency fees from the members of the Claimant Union unless stopped.

13. They contend that the 1<sup>st</sup> Respondent has failed or neglected to produce a list of members of the Claimant Union who have purportedly benefited from the purported CBA negotiated between the Government and 3<sup>rd</sup> Respondent.

14. The Claimant state that in Case No. 1570/2013, Hon. J. Nderi had ruled that the 3<sup>rd</sup> Respondent should refrain from unduly benefiting from members who have willfully chosen to migrate to the Claimant Union but 1<sup>st</sup> Respondent has blatantly and with impunity ignored the said ruling and gone ahead to issue a blanket directions which is harmful to the members of the Claimant Union.

15. That there is also an existing Court order dated 6<sup>th</sup> December 2013 which disengaged members of the Claimant Union from the Civil Servants and that this order Appendix SM.5 has never been vacated.

16. The Claimant also contend that the 2<sup>nd</sup> Respondent was a party in Case No. 1570/13 and has failed or

neglected to advise the 1<sup>st</sup> Respondent as regards the issuance of the special issue of Kenya Gazette Supplement No. 19 of 20<sup>th</sup> February 2015 which contravenes the ruling and order of 25/2/2015 and 6/12/2014 respectively. The Claimant therefore seeks orders:

- a. ***“That the Honourable Court be pleased to order 4<sup>th</sup> and 5<sup>th</sup> Respondents not to implement the Kenya Gazette Supplement No. 19 dated 20<sup>th</sup> February 2015 upon the members of the Claimant.***
- b. ***That this Honourable Court be pleased to order the deduction of the Agency fees as directed by the 1<sup>st</sup> Respondent through the Kenya Gazette Supplement No. 19 dated 20<sup>th</sup> February 2015 upon the members of Claimant Union is illegal ab initio.***
- c. ***That this Honourable Court do order the 1<sup>st</sup> Respondent to produce the list of employees whom he intends the directive in Kenya Gazette Supplement No. 19 dated 20<sup>th</sup> February 2015 to be applicable to.***
- d. ***That a declaration that the Kenya Gazette Supplement No. 19 dated 20<sup>th</sup> February 2015 does not apply to the members of Claimant Union.***
- e. ***That the Honourable Court be pleased to grant any other relief it may deem fit and just to grant in the circumstances pending the hearing and determination of this application.***
- f. ***That the Honourable Court be pleased to order the 1<sup>st</sup> Respondent to pay the costs of this suit”.***

17. 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents didn't file any response to the claim but they chose to file a Replying Affidavit sworn on 25<sup>th</sup> May 2015 sworn by one Robinson Juma Twanga a Principal Labour Officer in the employment of the Government.

18. In the said affidavit, the deponent has deponed that the 3<sup>rd</sup> Respondent was registered in 1959 and was later prescribed in 1983 before subsequent re-registration on 10<sup>th</sup> December 2001 (Appendix RJT-1 and RJT.2).

19. He also avers that the 3<sup>rd</sup> Respondent initiated negotiations and eventually signed a CBA with the Government of Kenya which was registered in Court as per Appendix RJT-3 and RJT-4.

20. Thereafter 3<sup>rd</sup> Respondent obtained orders for deductions of Union dues on 9-2-2006 (RJT-6). That through a letter of 21.2.2011 the Secretary General of 3<sup>rd</sup> Respondent applied to the Cabinet Secretary for an order for deductions of Agency fees under Section 49(1) of the Labour Relations Act which provides for deduction of such agency fees from an unionisable employee covered by the CBA but who is not a member of the Union (Appendix RJT.7).

21. This request was not granted as it contravened the provisions of the CBA between the parties and this was communicated to 3<sup>rd</sup> Respondent through a letter RJT.8 dated 2.3.2011.

22. Thereafter, there followed communication where Union dues were increased with effect from 18.2.2011 from 100/= to 1.5% of member's basic salary. Another development was the request for deductions of agency fees for Civil Servants covered by the CBA within Job Group A-L. On 4.7.2013, the Labour Ministry wrote to the Cabinet Secretary for Devolution and Planning requesting for a list of employees within those Job Groups who were covered by the CBA but were not members of the Union (appendix RJT 10).

23. This list was also requested for Secretary General of 3<sup>rd</sup> Respondent through a letter dated 4.6.2013 (RJT-5). The 3<sup>rd</sup> Respondent further made requests for order of deduction of agency fees on 17.10.2014

and the Permanent Secretary, Ministry of Labour asked for the list of relevant employees. Thereafter, the Cabinet Secretary requested for publications of Gazette Notice for deductions of Agency fees and orders were made vide Gazette Notice No. 19 of 20<sup>th</sup> February 2015.

24. He avers that the deduction of Agency fees is provided for under Section 49 of Labour Relations Act and CBA signed between the 3<sup>rd</sup> Respondent which covers Nursing Officers and Enrolled Nurses.

25. The Respondents also aver that they have not signed any CBA with the Respondents and they opine that the case herein by Claimant is an abuse of the Court process and they want the same dismissed as against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

### **The 3<sup>rd</sup> Respondent's defence**

26. The 3<sup>rd</sup> Respondent also filed a replying affidavit sworn by one Tom Odege the 3<sup>rd</sup> Respondent's Secretary General on 23.3.2013 where they aver that the application/claim by the Claimant is a complete misstatement and misapprehension of the legal and factual basis of Agency fees and general principles of industrial relations.

27. They contend that as a trade union, they have negotiated with the Government for the better of Civil Servants which the Claimants benefited. That they also pushed for signing of a CBA which was finally signed on 16/4/2013 bringing in better terms enjoyed as early as 2010.

28. That the Applicant having been registered on 19.4.2013 has no CBA with the Government and has never negotiated any fresh terms for the members as to entitle it to Agency fees.

29. They contend that Claimants members benefited from negotiations they conducted with the Government and as such they submit that until there is a separate CBA signed by the Applicant and Government there is no basis upon which the Applicant can claim entitlement to Agency fees.

30. They want the Claimant's case dismissed accordingly.

### **5<sup>th</sup> Respondents response**

31. The 5<sup>th</sup> Respondent filed their replying affidavit dated 2.5.2015 on 21.5.2015. The same was sworn by one Isaac Ruto the 5<sup>th</sup> Respondent's Chairman and Governor of County Government of Bomet.

32. He avers that the Claimant is a beneficiary of the agreement between the Government of Kenya and the 3<sup>rd</sup> Respondent. They also aver that there is no CBA between the Government of Kenya and Claimant and that the impugned Gazette Notice is a directive of the Executive and cannot be interfered with by the Court in view of the principal of separation of powers.

33. That Claimant will not suffer any harm, and so they want the Claimant's case dismissed accordingly.

34. By agreement of all the parties, the claim proceeded by way of written submissions. The submissions were filed by all the parties. The Claimant filed their submissions on 15/12/2016 where they reiterate issues raised in the claim and the Respondent's replying affidavit.

35. They submit that this Court should determine whether the Kenya Gazette Supplement No. 19 dated 20<sup>th</sup> February 2015 is illegal. They submit that the same is illegal for not complying with provisions of Section 49(2)(b) of the Labour Relations Act since a formal request for collection of Agency fees was not submitted in Court and neither was the list of beneficiaries for whom the deductions are to be made submitted. They cited **Amalgamated Union of Kenya Metal Workers vs. Unity Auto Garage (Nairobi) Limited (2014) eKLR** to support their contention.

36. They also asked Court to consider the ruling of Cause 1510/2013 by J. Nderi which orders 3<sup>rd</sup> Respondent to refrain from collecting Agency fees from members who have willfully chosen to migrate to the Applicant Union (Claimant).

37. They also submit that parameters to be met before Agency fees can be collected have not been met as per Section 49(2) of Labour Relations Act.

38. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents on their part filed their submissions on 27.1.2017 and also reiterated their averments in their affidavit. They want Court to determine whether enjoining the 1<sup>st</sup> Respondent was necessary and whether the Gazette Notice would be implemented.

39. They submitted that the Constitution of Kenya 2010 provides for protection of public officers under Article 236 which provide that a public officer shall not be victimized or discriminated against for having performed the functions of the office in accordance with the Constitution or any other law. They cited **Patrick Wanyonyi Khaembe vs. Secretary TSC & Another (2014) eKLR and Githu Muigai & Another vs. LSK & Another (2015) eKLR.**

40. They submitted that the Gazette Notice under contention is valid and should be allowed.

41. On the issue of the list of employees to be submitted, they submitted that the information requested cannot be enforced as it was not requested for under Article 35 of the Constitution.

42. They want the case dismissed.

43. The 3<sup>rd</sup> Respondent filed their submissions on 8/2/2017. They submitted that they complied with provisions of Section 49 of Labour Relations Act and that they were the only union covering all civil servants before 2013.

44. They further submitted that this suit is premature and offends fair Administrative Action Act where the Claimant may have moved and supplied the list. They want this case dismissed.

45. The 5<sup>th</sup> Respondent on their part filed their submissions on 1.2.2017 and they reiterate their averments in their replying affidavit. They cited **Kenya Hotels & Allied Workers Union vs. A.G and 6 others (2015) eKLR** and their contention is that Section 49 of Labour Relations Court was complied with.

46. Having considered the averments and submissions of all parties, I narrow down to issues to be determined as follows:

***1. Whether 1<sup>st</sup> Respondent is properly enjoined in these proceedings.***

***2. Whether the Gazette Notice No. 19 of 20.2.2015 is valid and tenable.***

47. In determining issue No. 1 above, I note that the 1<sup>st</sup> Respondent is enjoined in this suit in his personal capacity. When the 1<sup>st</sup> Respondent acted in this case, he did the Gazette Notice in his capacity as Cabinet Secretary for Labour in his official capacity. Suing him in his private capacity by name therefore offends the provision of Article 236 of Constitution which states that:

***“A public officer shall not be:-***

***a. Victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law.....”.***

48. It was improper to sue the 1<sup>st</sup> Respondent in his name in an individual capacity and I find he was wrongly enjoined in this case. I will therefore find for him and dismiss the case against him with costs to

him.

49. On the 2<sup>nd</sup> issue Section 49 (1) and (2) of Labour Relations Act states as follows:

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.*”**

2. ***A request in accordance with subsection (1) shall:***

***a. be signed by the authorized representatives of the trade union and employer, group of employers or employers’ organisation;***

***b. supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;***

***c. specify the amount of the agency fee, which may not exceed the applicable trade union dues; and***

***d. specify the trade union account into which the dues shall be paid.***

50. My reading of the above provision indicate that for any agency fees to be deductible there:

***i. Must be a valid CBA in existence which benefit the category of employees;***

***ii. There must be a request in writing for the said authority;***

***iii. List of all employees prepared by the employer should be provided for purpose of the said deductions.***

***iv. Amount to be deducted must be stated;***

***v. The trade union account must be stated.***

51. In the case in issue, there is no proof that such request was made and a list of employees to be affected submitted.

52. Further there is no evidence that there is a valid CBA covering the period in issue except the 11 year old CBA which was now overtaken by the circular from the SRC stating that all CBAs existing were to terminate by 30<sup>th</sup> June 2013 and no new CBA had since been submitted before the gazette notice in issue.

53. There is also evidence that the Claimants have a separate recognition with the Government and that implies that their members are now paying union dues. Can they in the same vein pay agency fees to another union?.

54. There were the issues in the case of **Rift Valley Railways Workers Union vs. Rift Valley Railways (K) Limited and Another (2014) eKLR** where the Learned Judge Ndolo held that the provision of Section 49(1) does not apply where an employee belongs to a rival trade union in the same Section.

55. Hon. J. Nderi in **Tailors & Textile Workers Union vs Ashton Apparels (EPZ) Limited (2015) eKLR** reiterated the same position.

56. In the case **of Harris vs Quinn 134 S. Ct 2618 (2014)** – it was held that forcing non-governmental

workers to pay agency fees to a union that represents governmental workers just because they received a governmental benefit in the form of medical assistance was unlawful. The Court went onto state that freedom of association presupposes freedom not to associate.

57. Indeed Article 41 of the Constitution of Kenya provides for the right of Freedom of Association. This in essence incorporates the freedom not to associate. The Claimant members having chosen to join the Claimant Union cannot still be compelled to pay agency fees to the 3<sup>rd</sup> Respondent.

58. Hon. J. Nderi had already made this observation in an earlier ruling stated in these proceedings and it is also this Court's finding that the 3<sup>rd</sup> Respondent have not demonstrated that they have a right to the agency fees from the Claimant members for the reasons given above and the blanket gazettment of Gazette Notice No. 19 of 20.2.2015 was in bad faith and declare it illegal and of no consequence and shall not affect members of the Claimant Union.

59. The Respondents shall meet costs of this suit.

Read in open Court this 27<sup>th</sup> day of February 2017

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent