



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 759 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 31st May, 2017)

**KENYA UNION OF ENTERTAINMENT AND
MUSIC INDUSTRY EMPLOYEESCLAIMANT/APPLICANT**

VERSUS

BOMAS OF KENYA LIMITEDRESPONDENT

RULING

1. The Claimant filed suit on 7th May, 2012, seeking for release and remission of all union dues deducted equivalent to 3% wages/salary in arrears paid and for the Respondent to be compelled to implement Gazette Notice No. 16483 and No. 4336 to the letter including deduction of agency fees from unionisable non-members and those who may have withdrawn their membership but still enjoy the benefits of the parties CBA.

2. Seemingly the outstanding issue in the matter that remains to be determined by the Court is whether management can deduct agency fee on members who have joined KUDHEIA in lieu of which, the parties filed submissions.

3. The Claimant in submissions submits and states that the Respondent has not been deducting agency fees from 26 employees who are not members and 111 employees purported to have withdrawn from the Claimant union which they state should be deducted and remitted with immediate effect. They submit that according to Section 49 of the Labour Relations Act the Respondent is bound to remit such dues. The Section provides:

“A member of a trade union covered by a Collective Agreement contemplated by subsection 1 who resigns from the union is immediately liable to have an agency fee deducted from his wages in accordance with this section.”

4. The Respondent however maintains that they have deducted and remitted all dues to the Claimant and this issue is not moot as far as they are concerned.

5. On whether the Respondent has a right to stop deduction of agency fees before revocation of Gazette Notice and the Recognition Agreement, they state that this is contrary to Section 49(4) of the Labour Relations Act.

6. Further they state that there is in existence another Order of the Court in Cause No. 2066 of 2015 between the same parties herein barring negotiations of any other Collective Agreement between the Respondent and any other Union apart from the Claimant. The alleged Order is attached to the Replying affidavit as Appendix 3. They are of the view therefore that agency fee is payable from the employees enjoying benefits of their CBA and are not members of the Claimant.

7. Respondent has also submitted on the issue of deduction of agency fees. They state that the Court has already pronounced itself on where members have resigned from a union and opted to join another union. They cite **Cause No. 999 of 2011 Kwahu vs. Sunset Hotel Limited and Another** where it was stated:

“there cannot be deduction of agency fee in the same vein when a person has opted for a union recognized by his employer and still have agency fee deducted to another union.”

8. The Respondent further relied on the preamble of the Labour Relations Act which encourages freedom of association of employees and prays for the Court to hold that the Respondent cannot deduct union dues and at the same time deduct agency fees.

9. Having considered submissions from both parties, this Court is of the view that Article 41(2) (c) of the Constitution is clear on Freedom of Association and states as follows:

”to form, join or participate in the activities and programmes of a trade union”.

10. Freedom of Association envisions the ability of the employee to join and participate in activities of any trade union of their choice. An employee having so joined the union may leave that same union as he/she wishes. Thus Section 49(5) of Labour Relations Act states as follows:

“A member of a trade union covered by a collective agreement contemplated by subsection (1) who resigns from the union is immediately liable to have an agency fee deducted from his wages in accordance with this section”.

11. In my view the catch word here is immediately and this means that thereafter the said agency fees may not be payable if the member moves on to another union. If this is not implemented then we may have a situation where an employee is a member of one union and is paying union dues at the same time is paying agency fees to a former union and this will amount to a double payment to the detriment of the employee.

12. In the three Judge bench Industrial Court case No. 1964/2011 (formerly Petition No. 1964/2011) KHAWU vs. the Hon. Attorney General & Others, the learned Judges Nduma, Onyango and Ndolo pronounced themselves on this matter and is on 2:1, JJ Nderi and Onyango held that both union dues and agency fees is payable in such a case.

13. However a dissenting Judgment by Ndolo J, the Hon. Judge was of the view that union dues should not be deducted from a member who is a member of a rival union.

14. I do agree with this dissenting position and it is my view that forcing payment of union dues from a member who has moved on to another union, fetter their freedom of association while at the same time amounts to double payment to the detriment of the member.

15. It is envisaged that agency fees should be deducted at most without the cycle of the CBA in question and thereafter the union should let go as another union if in place takes over and receives union dues.

16. That being the position it is my finding in this case that the claim by the Applicants against the Respondents for payment of agency fees from their non-members who have moved on to another union is not tenable and the same is therefore rejected.

Read in open Court this 31st day of May, 2017

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mucuha for Claimant – Present

Kanyiri for Respondent- Present