



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.643 OF 2015

KENYA AVIATION WORKERS UNION.....CLAIMANT

VERSUS

BOLLORE AFRICA LOGISTICS – KENYA.....RESPONDENT

AVIATION & AIRPORT SERVICES WORKERS UNION.....INTERESTED PARTY

RULING

1. On 20th April 2015, the Claimant, Kenya Aviation Workers Union (KAWU) filed application dated **16th April 2015** and Notice of Motion under the provisions of article 35. and 41 of the constitution, sections 12, 48 and 49 of the Industrial Court Act [Employment and Labour Relations Court Act] and Rule 16 of the Court Rules.
2. Upon filing their application, the Claimant was granted interim orders stopping the Respondent from operating, implementing and effecting memo dated 8th April 2015 and also stopped from making any deductions from Claimant embers salaries as agency fees to the interested party. In the interim also, it became apparent that there was a dispute filed in **Judicial Review No.1 of 2014, Aviation & airport Services Workers union versus Register of Trade union and KAWU** pending before this Court. Such matter had the impact and potential effect affecting issues herein noting several parties had entered appearance herein for the interested party – Leonard Rufus Ochieng appeared on 7th May 2015 for the interested party; Bonne Nicholas Barasa filed Affidavit in support of representation on 15th May 2015; and McKay & Co. Advocates filed Notice of Change of Advocate and appeared for the interested party on 21st May 2015.
3. Ruling in **Judicial Review No.1 of 2014** was delivered on 15th January 2016, however this resolved the issue of a consent on 13th October 2011 and the presentations made by Rob B. Abkula. I take is that that matter is still ongoing unresolved.
4. For proceedings herein the Court on 29th October 2015 delivered a ruling and directed the interested party to resolve matters within itself urgently. Such has not been moved. The ruling herein, and noting the application at hand by the Claimant shall address the interested party as an entity. However, from the pleadings filed, only the Respondent challenged the claimant’s application dated 16th April 2015 by filing Repling Affidavit on 30 April 2015, sworn by Felix Mulwa on 29th April 2015.
5. The gist of the application herein is that the Claimant, KAWU is seeking preservative orders to stay

and or stop the operation, implementation and effect of the respondent's memo dated 8th April 2015 requiring the deduction from the salaries of members of the Claimant and payment of the agency fees to the interested party by the Respondent. This follows that Gazette Notice No.5027 of 2009 dated 6th May 2009 directing the deduction from salaries of the members of the Claimant union so as to pay agency fees to the interested party. Other orders are that the Court should prohibit the Respondent from deducting agency fees from KAWU members and that such deduction made should be refunded based on the agency fees deducted vide memo dated 8th April 2015.

6. The application is supported by the annexed affidavit of Moss Ndiema and on the grounds that the Claimant has the majority of the employees of the Respondent as its members with a representative and participatory rights unlike those of the interested party. Without participatory rights, the interested party has no right to agency fees payable by the Respondent, but on 8th April 2015 the Claimant received a memo from the Respondent commencing a deduction of agency fees from its members by the Respondent. The decision to make deductions was made without the prior knowledge of the Claimant and was implemented without a criteria and with selection all remitted to the interested party. That the terms of the memo are unprocedural and unlawful with irreparable injury to the Claimant for being contrary to fair labour practices.

7. Other grounds are that the orders sought by the Claimant will not cause any prejudice to the Respondent as the Claimant is seeking for the safeguard of rights under articles 10, 26, 41, 43, 47 and 50 of the constitution, section 48 and 49 of the Labour Relations Act. The orders are seeking to restrain the Respondent from carrying out any acts which infringe on the rights of Claimant which will otherwise be irreparably damaged.

8. In the Supporting Affidavit of Moss Ndiema he avers that he is the secretary general of the Claimant and support the application before Court. On 27th march 2015 the Respondent wrote to chief industrial relations officer, Ministry of Labour, social security and Services declaring a trade dispute, which dispute was unknown to the Claimant and interested party. On 8th April 2015 and before the dispute could be heard, the Respondent a memo that they were going to deduct from Claimant members' salaries agency fees payable to the interested party pursuant to section 49 of the Labour Relations Act and in terms of Gazette Notice No.5027 of 22nd may 2009. From the Respondent memo, the interested party wrote letter dated 15th April 2015 questioning the decision to deduct agency fees in its favour.

9. Mr Ndiema also avers that before the memo dated 8th April 2015, the Claimant was aware that on 15th January 2015 they signed a Recognition Agreement with the Respondent following long negotiations and with the knowledge that the interested party also had a similar Agreement with the Respondent. The Claimant retained majority members in the Respondent employment. The interested party held many accounts particularly one with Stanbic bank, Kimathi Avenue where agency fees deducted pursuant to Gazette No.5027 was to be submitted has been closed.

10. Mr Ndiema also avers that as at 15th January 2015 he was aware that the interested party had a Recognition Agreement with the Respondent dated 15th June 2014 under RCA No.14 of 2009. Such CBA has become otiose. The memo therefore issued by the Respondent and the subject of application herein was made with the sole purpose to assist the interested party financially contrary to the interests of Claimant members. The Respondent has not acted honestly which is contrary to Claimant interests. As such, the memo threatens to take away Claimant members rights and contravenes section 48(6) and 59(2) of the Labour Relations Act.

11. The Respondent is opposed to the claimant's application and filed Replying Affidavit sworn by Felix Mulwa the Human Resource Manager. He avers that the Claimant does not comprehend the circumstances leading to the memo under reference as KAWU represents some employees of the Respondent pursuant to a Recognition Agreement between the parties. Also some employees are represented by the interested party, AAWU (K).

12. Mulwa also avers that in 2009 the Minister in Gazette No.5027 published directed the Respondent to deduct agency fees from unionisable employee who were not members of AAWU (K) but were covered by the CBA between the Respondent and AAWU (K). The Respondent and the interested party enjoy a CBA for 2014 to 2015 which is applicable to all unionisable employees. Gazette No.5027 direct the deduction against each employee who is not member of AAWU (K). the Recognition Agreement executed between the Claimant and the Respondent was on 16th January 2015 and since, the Claimant members ceased being interested party members and with such cessation, agency fees is due for a deduction. Such deduction is in compliance with section 49 of the labour Relations Act under which Gazette No.5027 was issued. Such Gazette has not been revoked. Such Gazette apply to the then and current CBA subsequently signed between the parties to it. Such agency fees has not previously been collected as Claimant members were members of the interested party. The collection of such agency fees is not in contravention of any constitutional rights.

13. Mulwa also avers that as long as N No.5027 subsists, the Respondent must comply with it failing which legal sanction follow. The intention here is not to assist the interested party, rather, to comply with the law. The memo thus issued was to inform Claimant members of the due deductions which notice the Respondent is required to issue. The fact that the Claimant represents the majority of employees in the service of the Respondent is not the issue, the Gazette Notice issued by the Minister is in favour of the interested party. The contested memo is necessary following resignations issued to the Respondent by the Claimant members to leave the interested party as their union.

Submissions

14. On the interim injunctive orders the Claimant is seeking to rely on the case of **Julius maina Kinoko versus Hezekiah Ndinguri Njenga t/a Tabby Services [201] eklr**, and which case set out the principles governing the issuance of interlocutory injunctions in that there must be a *prima facie* case with high chances of success, a party is likely to suffer irreparable injury that cannot be compensated in damages, and that balance of convenience tilts in favour of such a party. That this Court is also guided by the principle of proportionality as one of its overriding objectives. Such principles are not cast on stone and should be concerned with meeting ends of justice as held in **Suleiman versus Amboseli Resort Limited [2014] eklr**. The Court must consider where there is a higher risk of injustice and issue directions as appropriate as held in **Mrao Ltd versus First American Bank of Kenya ltd & 2 others [2003] KLR**, there must be an arguable case and evidence showing the infringement of a right with high chances of success at trial.

15. The Claimant also submitted that section 49 of the Labour Relations Act provides for a mandatory deduction of agency fees but in this case, if the orders sought are not granted, such will be applied to the wrong parties contrary to the law. If at the trial the Court finds that section 49 is not applicable to Claimant members, any deductions so far made will have been done unfairly. Such will have been an unfair labour practice. The Respondent will not have suffered any prejudice.

16. The Memorandum of Claim sets out the substance of Gazette Notice No.5027 of 2009 and in terms of section 49 of the Labour Relations Act, such is otiose noting the Claimant member's majority holding in the Respondent employment. Despite there being a CBA between the Respondent and interested party dating back to 2009, such should not be applied to Claimant members. The direction thereof requiring the deduction of agency fees from the Claimant members and remitted to the Respondent is therefore unlawful. That the application of section 49(2) of the Labour Relations Act requires the filing of list of employees to the Minister and in this case, for the Respondent to apply these provisions without evidence that the Minister has a list that include Claimant members would be prejudicial.

17. The Claimant also submitted that there is no evidence that where there is a CBA that allow the deduction of agency fees, upon its lapse, where members who have resigned and joined another union should be deducted or should continue being deducted such agency fees. The averments by the Respondent that the CBA of 2009 once gazetted applies to subsequent CBA is not correct as a gazette notice does not apply *infinitum* and against employees who are not members of the union or are new employees and are not listed in the list forming part of the documents the Minister relied upon in the

publication of Gazette Notice No.5027 to justify the deduction or agency fees. That the Respondent is using illegal means to favour another union – the interested party – against the interests of Claimant union members, which violates article 29 of the Constitution and section 5 of the Employment Act.

18. The Claimant also submit that the fact that the Respondent has not deducted agency fees for the last 5 years is evidence that there has been no need to and the memo issued for such a deduction has no legal basis or justification. There is therefore a *prima facie* case set out by the Claimant which case has high chances of success to warrant the orders sought. The Claimant shall suffer irreparable loss and damage where the Respondent is not stopped from implementing the memo as issued.

19. The **Respondent on their part submit** that the intention of parliament in enacting section 49 of the labour Relations Act was to ensure that any employee benefiting from a negotiated CBA and is not a member of the union, pay an agency fees. Such is made a legal requirement. The notice issued by the Minister in Gazette Notice No.5027 was to actualise the law in this regard. The CBA between the Respondent and interested party has clause 15 that allow deduction of agency fees. There is no prejudice to be suffered by the Claimant members as they enjoy the provisions of this CBA and since they have resigned from the interested party, agency fees is due for deduction.

20. The Respondent also submit that in this case, it is not in dispute that there exists Gazette Notice No.5027, the notice require the Respondent to deduct agency fees from any employee not a member of the interested party, and the Claimant members resigned and joined the Claimant union in January 2015. The cessation of membership of Claimant members from the interested party therefore is reason for the Respondent to issue the contested memo. The application by the Claimant in seeking to stay the operation, implementation and effect of the Gazette Notice No.5027 of 6th May 20109 and in effect stopping the operation of the memo dated 8th April 2015 would be to stop a lawful process.

21. The principles governing the grant of injunctions of the nature sought by the Claimant is settled in the case of **Giella versus Cassman Brown & Co. Ltd (1973) EA** where there must be a *prima facie* case with probability of success and the applicant will suffer irreparable injury that cannot be compensated by way of damages. A *prima facie* case exists where a right is established and has apparently been infringed by the opposite party as held in **Mrao Ltd versus First American bank of Kenya Ltd & 2 Others, Court of Appeal No.39 of 2002**. In this case, no *prima facie* case has been set out by the Claimant as the Gazette Notice No.5027 was lawfully published and the Respondent is in compliance therefore the memo dated 8th April 2015. There exists a valid CBA registered by this Court in RCA No.14 of 2009. Section 49. of the labour Relations Act lays the foundation for the deduction of agency fees as held in **Kenya Union of Journalists & Allied Workers versus nation Media Group Limited & Another, Cause No.799 of 2010**. Therefore, where an employee resigns from his union and is benefiting from the existing CBA, the deduction of agency fees is lawful. Such does not violate any constitutional rights as it is lawful to make such deductions. Such a deduction serves to equalise wages and to spread the benefits of trade union security and labour management.

22. The Respondent also submit that there exists a valid CBA between them and interested party the effect of which is set out under section 59 of the Labour Relations Act. Such an Agreement is not a commercial contract where privity and freedom of contracting apply as held in **Kenya Union of Journalists & Allied Workers versus nation Media Group Limited & Another**. The operation of the CBA between the Respondent and interested party did not cease with the resignations of the Claimant members. The agency fees is deductible from employees who are not members of the interested party which the Claimant members are. The issuance of Gazette Notice No.5027 makes it valid until its revocation. The Respondent has not committed any illegality to warrant the orders sought and in effect the claim setting the violation of various constitutional rights has not been established. The application should be dismissed.

Determination

23. The principles set out in the **Giella v. Cassman Brown case** are that for an applicant to be entitled to an injunction he or she must first of all demonstrate that there is a *prima facie* case with probability of

success. Once this is done, the next test is to satisfy the Court that damages would not be an adequate remedy if the claim ultimately succeeds. However in the event that the Court is in doubt concerning the two limbs the Court will decide the matter on a balance of convenience.

24. The position above is further expounded In the **American Cyanamid** where it was held;

...when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction ... The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where [the balance of convenience is]...

25. The Court of Appeal in the **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others** has gone a step further and set out what a *prima facie* case is;

So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

26. Therefore, the applicant must set out a clear right that has been infringed or that continues to be infringed and if not stopped by the Court will cause irreparable loss and damage. The orders sought then must be with the view to mitigate any resulting injustice set out in the **American Cyanamid case** that *to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction.*

27. However, in employment cases, such principles enunciated above must be looked at in view of ensuring fair labour relations, the context of agreements between the parties especially the CBA, and overall, ensuring industrial peace. There must therefore exist a right, evidence of an infringement of the right, and high chances of success upon trial. It should not just be that there exists an arguable case. The bar was raised on the **Mrao Ltd case**, which in my view ensures that the grant of interlocutory orders do not perpetuate an injustice to any party.

28. The context here is that Claimant members have since resigned from the interested party and the Respondent has issued memo dated 8th April 2015 to deduct agency fees from such members. There is a Recognition Agreement between the Claimant and the Respondent. It is also acknowledged that the Respondent and the interested party enjoy a CBA.

29. The question with regard to the deduction of agency fees is a matter that has been addressed by this Court in several cases. It keeps re-emerging in different forms. It will not be resolved until all employees are unionised. With unionisation, the employees exercising their right under article 41(2) (c) of the constitution, where there exists a CBA dully negotiated and registered, section 49 of the Labour Relations Act shall be obsolete. For now, section 49 on the deduction of agency fees from unionisable employees covered by a CBA is lawful and an employer directed by the Minister to make deductions, does so in pursuance to section 49(3) of the labour Relations Act as this is the law. What is apparent herein is that within the Respondent employees, there is a CBA with the interested party and a Recognition Agreement with the Claimant unions respectively. Annexures "MN7" in the Supporting Affidavit of Moss Ndiema

sets out a long list of check off forms and letters filed with the Respondent under the provisions of section 48(6) and (7) of the Labour Relations Act. Therefore, the employees of the Respondent have dully exercised their rights under section 48 and the Respondent is keen to comply with provisions set out under section 49 of the Labour Relations Act.

30. There however exists letter dated 15th January 2015 from the interested party and signed by Rob Abkula, Acting General Secretary with regard to agency fees that;

In your [respondent] letter dated 27th March 2015 which you copied to us, you indicated that “agency fees” was one of the issues for determination at conciliation.

Aviation and Airport Services Workers Union [interested Party] will not be party to moves aim[ed] at the defrauding and or infringing on the rights of workers.

31. However, section 49 of the Labour Relations Act is largely directed at the employer and not to the union such as the interested party. The compliance of the provisions set out therein are for an employer thus;

49.(1) A trade union that has concluded a collective Agreement registered by the National Labour Court with an employer, group of employers or an employers’ organization, 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.

32. 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. The deductions contemplated under section 49 of the Labour Relations Act therefore being lawful, the submission that such are a restriction and violation of constitutional rights under article 29, 35 and 41 of the Constitution does not suffice.

33. 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. Specifically, where an employee is unionised and has remitted union dues but wishes to leave such a union, there is the freedom to exercise the right to associate and the applicable provision is to be found at section 49(5) thus;

5. A member of 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.

34. These provisions therefore affirm the right to associate, the right to choose which union to join or cease membership. It is a lawful process. Such a right is however exercised in context of existing benefits. In this case, where Claimant members have enjoyed a CBA between the interested party and the Respondent, being unionisable union dues are payable under section 48 due to their union upon registration of a CBA. Immediately such membership cease due to resignation or for other factors section 49 apply. However, where such a unionisable employees seek for the application of section 48(6) and (7), context must be set as with the filing of resignation contemplated under section 48(6), due regard must be

given to what is due under the current CBA vis-à-vis any Recognition Agreement that may exist for such an employee to cease enjoying the benefits that go with the application of section 49. This is so as a Recognition Agreement is not similar to a CBA. One gives a trade union the right to negotiate with a given employer while the other confer terms and conditions at and of work and benefits due. Contrary to the submissions by the Claimant that deduction of wages for union dues or agency fees cease once the term of a particular CBA lapse is not the case, a CBA remains in force for its terms and the CBA herein registered under RCA No.14 of 2009 I find had transitional provisions and the Gazette Notice No.5027 of 2009 remain in force until the Minister publishes a variation or there is a revocation.

35. Deductions from an employee's wage is Lawful pursuant to section 17 of the Employment Act;

19. (1) ... an employer may deduct from the wages of his employee—

...

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, Court order or arbitration award;

36. Up and until the execution of a CBA between the Claimant union and the Respondent, the registration of the same and the Minister issuance of the appropriate Notice, their members being unionised continue to enjoy the existing CBA between the Respondent and the interested party. Fair labour relations and on the basis of rule of law demands that such existing agreements be enforced. Such cannot be found to be in violation of constitutional rights under article 37, 41, 47 or any other provisions of the law. The existence of an account published by the Minister for the interested party at Stanbic bank, Kimathi Avenue where due remitted by the Respondent were to be deposited is not a matter for the Claimant, such is to be addressed directly by the interested party. It cannot form the basis of stopping the Respondent from executing a legal requirement. The unionisable employee within the service of the Respondent, of whom the Claimant members are, have enjoyed the current CBA between the Respondent and interested party and shall continue to so enjoy it until a CBA between the Claimant and Respondent is registered with this Court and the appropriate notice by the Minister published.

37. Gazette Notice No.5027 is not arbitrary. It has the force of law pursuant to the registration of a CBA in RCA No.14 of 2009 under the labour Relations Act. Any variations to the requirements thereto must have the force of law. I therefore find, the memo dated 8th April 2015 is valid and legitimate and to stop its operation in terms of the Respondent implementing it would be to ignore clear provisions of the law. Such implementation does not in any manner violate any constitutional rights of the Claimant members.

38. I have had chance to look at the memorandum of claim dated 16th April 2015 filed together with the application and notice of Motion herein. The orders sought in the Notice of Motion are a replica in the prayers under the claim save that the Claimant is seeking for a refund of any amounts deducted by the Respondent and paid to the interested party as agency fees. Such deduction as set out above are lawful and in the duty of the Respondent to effect. The continued deductions of such fees is not in any manner or form in violation of the Claimant members right to association, fair labour relations, right to property, fair administration action or fair hearing. Such deductions are made in accordance with clear provisions of the law. Where the Respondent fails to ensure the deductions as directed that would be the illegality. As such to keep the suit alive on this findings will not achieve much.

39. In conclusion, having undertaken the analysis of the applicants suit and application in the context of the principles governing the grant of interlocutory injunction and especially in employment matters, the Court has come to the conclusion that the Claimant has failed to demonstrate that there is a right that has been infringed and that there exists a *prima facie* case with probability of success and even if the Court were to err in so finding, the Claimant has failed to demonstrate that injustice will be occasioned to then in the clear implementation of the law and memo dated 8th April 2015 issued by the Respondent.

In the circumstances the orders issued on 20th April 2015 are hereby vacated. Application dated

16th April 2015 is hereby dismissed. Noting that the parties herein have abided by the orders issued in the interim, there shall be no orders as to costs.

Orders accordingly.

Read in open court at Nairobi this 23rd day of February 2016.

M. Mbaru

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

.....

.....