



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

**AT NAIROBI**

**CAUSE NO. 1194 OF 2016**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 25<sup>th</sup> July, 2016)**

**KENYA PLANTATION &**

**AGRICULTURAL WORKERS UNION .....CLAIMANT**

**VERSUS**

**AGRICULTURAL EMPLOYERS ASSOCIATION.....RESPONDENT**

**RULING**

1. The Application before Court is one dated 20.06.2016, brought under Section 12(1),(2), (3) and (4) of the Industrial Court Act, 2011, read with Section 16(3) of the Industrial Court Procedure Rules, 2012 and all enabling provisions of the law where the Applicant seeks the following Orders:

***1. That the Application be certified as urgent and be heard ex parte in the first instance;***

***2. That, an Order be and is hereby issued that all Flower Grower Members of Agricultural Employers Association are hereby restrained and prohibited from non-compliance with Gazette Notice No. 13212 dated 26<sup>th</sup> October, 2010, ordering the Association to deduct and remit agency fees from all unionisable employees covered by the Collective Bargaining Agreement signed between the Union and the Association.***

***3. That, the Cabinet Secretary – Ministry of Labour be and is hereby ordered to facilitate negotiations between the parties herein for the review of the Collective Bargaining Agreement to cover the period 2015-2017 and report the progress made back to Court within 45 days from the date of the Order.***

***4. That cost of this Application be provided for.***

2. Which Application is based on the grounds that:

***1. That, the Applicant has a Recognition Agreement and concluded a Collective Bargaining Agreement with the Respondent.***

***2. That, the Collective Bargaining Agreement covers terms and conditions of service of all unionisable employees employed by the Flower Grower Members of the Association except those***

*defined as managerial.*

***3. That, Clause 1 of the Parties Collective Bargaining Agreement provides for deduction of Agency fees in accordance with Section 49 of the Labour Relations Act, 2007 Laws of Kenya which CBA has been registered by this Honourable Court.***

***4. That, the Association and the Applicant herein have complied with the provisions of Section 49 of the Labour Relations Act, 2007, Laws of Kenya and paved way for the Gazettement of Gazette Notice No. 13212 dated 26<sup>th</sup> October, 2010, by the then Minister for Labour Hon. John Munyes.***

***5. That, the Gazette Notice is still in force and applicable on the Respondent Agricultural Employers Association which comprise of all Flower Growers in its Membership.***

***6. That, the Respondent has instead instructed and advised all its members to cease deducting agency fees until the CBA is concluded, registered by the ELRC and the Minister issues an order through a Gazette Notice authorizing such deductions.***

***7. That, the instruction by the Respondent is an outright violation of the Gazette Notice to deduct and remit agency fees to the Claimant from all unionisable employees not members of the Union and covered by the Collective Bargaining Agreement, Sections 49(3) and 50(8),(i) of the Labour Relations Act, 2007 Laws of Kenya. Including the provisions of Section 19(f) of the Employment Act, 2007 Laws of Kenya.***

***8. That, the instruction is made in bad faith, its malicious and aimed at denying the Applicant right to Trade Union dues and or Agency fees as envisioned by the provisions of Section 48 and 49 of the Labour Relations Act, 2007, Laws of Kenya which is its financial source therefore stifle its administrative activities.***

***9. That, the Applicant stands to suffer irreparable damage should the Respondent proceed with the illegal refusal to deduct and remit Agency Fees to the Applicant Union and it's in the interest of justice and fairness that the Orders sought herein be granted.***

3. The Application is supported by the Affidavit of Thomas Kipkemboi who is the Deputy General Secretary of the Applicant wherein he states that there is a recognition agreement between the parties and have concluded a Collective Bargaining Agreement covering terms and conditions of service for all unionisable employees. Clause 1 of the CBA is to the effect that employees who are not members of the union are required to pay agency fees subject to Gazettement by the Minister for Labour.

4. That pursuant to the conclusion of the CBA the parties herein have been complying with the provisions of Section 49(2) of the Labour Relations Act, 2007, paving way for Gazettement of Gazette Notice No. 13212 dated 26.10.2010 which Gazette Notice is still applicable to date.

5. That the Respondent herein has proceeded to advise its members to cease deducting agency fees until the CBA is concluded, registered by the ELRC and the Minister issues an Order through Gazette Notice authorizing such deductions.

6. The Applicant states that this instruction is made in bad faith, it's malicious and aimed at denying the Claimants right to trade union dues and or Agency fees as envisioned by the provisions of Section 48 and 49 of the Labour Relations Act, 2007, Laws of Kenya which is its financial source therefore stifle its administrative activities.

7. The Applicant states that there is no record of de-gazetting the official status of Gazette Notice 13212 dated 26.10.2012 to authorize the Respondent to advise its members not to remit agency fees. That the fact that the present CBA covering the period 2013-2015 is still in force and under review does not preclude, set aside and or vary the effect of Gazette Notice no. 13212.

8. The Applicant further contends that they have not refused to negotiate the CBA covering the period 2015-2017 but have exchanged proposals and counter-proposals and even met with the Respondent towards review of the said CBA.

9. The Applicant prays that the prayers sought be allowed in the interest of justice as they stand to suffer irreparably if the Orders sought are not granted.

10. The Respondent have opposed the Application and have filed a Replying Affidavit sworn by one Wesley K. Siele the Chief Executive Officer of the Respondent wherein he states that pursuant to the conclusion of the 2009/2010 CBA, and upon compliance with Section 49 of the Labour Relations Act, a ministerial order on deduction of agency fee was gazetted vide Gazette Notice No. 31212 dated 26.10.2010 he advised the employers bound by the CBA to effect agency fees for all affected employees.

11. The Respondent holds the view that the Gazette Notice 13212 of 26.10.2010 applied to the 2009/2010 CBA and specifically to the employees as per the list supplied to the Minister for gazettelement.

12. They also state that the last CBA between the parties expired on 30.7.2015, and the parties have reached a deadlock thus the CBA is yet to be registered. The Respondent proceeded to advise its members that deduction of agency fees before a CBA is concluded, registered and a ministerial order is gazetted is against the law and could expose employers to legal action from affected employees.

13. It is the Respondent's contention that they received an ultimatum from the Applicant telling them to withdraw the advice to its members or face legal action to which they responded giving legal justification for their actions.

14. The Respondent state that the Application lacks merit as the purpose of the Application is for the Applicant to enjoy fruits of a CBA that is yet to be concluded and the employees to be affected by the prayers sought are not enjoying any benefit from the CBA. The Respondent prays for the Application to be disallowed with costs.

15. Having considered the submissions of both parties, I note that indeed the Applicant and Respondent have a CBA concluded on 12/2/2014 and which at Clause 37 provides that:

**"Effective date and duration**

***This agreement shall be in force with effect from 1<sup>st</sup> August 2013 and remain in force for 2 years. Thereafter, it shall continue in force until amended by both parties. Either party desiring to amend this Agreement shall give the other three months notice of intended amendment".***

16. My reading of this provision indicates that the provision signed on 12/2/2014 is still in force as it has not been amended and no trial CBA has been negotiated. It also follows that all rights and obligations under current CBA are still in force.

17. In terms of legal Notice No. 13212 of 26<sup>th</sup> October 2010 which was to re-enforce payment of agency fees the terms were that:

***a. the Association, Agricultural Employers Association to deduct every month the sum specified in respect of trade union agency fees from the wages of each of their unionisable employee who is not a member of the Kenya Plantation and Agricultural Workers Union herein referred to as the "Union" but is covered by the Collective Bargaining agreement signed between the Union and the Association a sum equal to two per cent (2%) from the salary of every employee who earns more than 2,500 per month.***

***b. Deductions to commence within thirty (30) days of receiving the order.***

***c. To remit within ten (10) days the sum deducted under item (a) by crossed cheques made***

**payable to the union into the Union's Account No. 0102019732300 at the National Bank of Kenya, P.O. Box 1013, Nakuru.**

18. There is no reference to the CBA concluded on 12/2/2014 nor is there any reference to the time of expiry. It is therefore this Court's finding that the decision by the Respondent to unilaterally stop deductions and remission of union dues is in bad light and against the CBA and the gazette notice directive.

19. I therefore find and order as follows:

***1. The Flower Grower Members of Agricultural Employers Association are hereby restrained and prohibited from non compliance with Gazette Notice No. 13212 dated 26.10.2010 ordering the Association to deduct and remit agency fees from all unionisable employees covered by the CBA signed between the Union and the Association.***

***2. The Cabinet Secretary, Ministry of Labour is hereby ordered to facilitate negotiations between the parties herein for the review of the CBA covering the post 2014 period and report back to Court within 60 days.***

***3. Costs in the course.***

Read in open Court this 25<sup>th</sup> day of July, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Parties