



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**PETITION NO. 27 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

*AND*

**IN THE MATTER OF THE INDUSTRIAL COURT ACT**

*AND*

**IN THE MATTER OF THE LABOUR RELATIONS ACT**

*AND*

**IN THE MATTER OF UNIONISABLE EMPLOYEES OF KENYA AIRWAYS**

*AND*

**IN THE MATTER OF GAZETTE NOTICE NO. 6135 DATED 2<sup>ND</sup> NOVEMBER 2012**

*BETWEEN*

**THE UNIONISABLE EMPLOYEES OF KENYA AIRWAYS BEING REPRESENTED BY  
STANLEY KIBET, SULEIMAN AZIZ, ANGELA NJENGA ..... PETITIONERS**

*VERSUS*

**AVIATION AND AIRPORT SERVICES WORKERS UNION (K) .....  
RESPONDENT**

*AND*

**KENYA AVIATION WORKERS UNION ..... 1<sup>ST</sup> INTERESTED  
PARTY**

**KENYA AIRWAYS LIMITED ..... 2<sup>ND</sup> INTERESTED  
PARTY**

Mr. Licholo for respondent/applicant

Mr. Chobika for 1st interested party/respondent

## **RULING**

1. Notice of notice of motion application dated 9<sup>th</sup> December 2015 and filed on the even date seeks the court for orders to;

i. Enjoin the Kenya Airways Limited as the 2<sup>nd</sup> interested party.

ii. Set aside the orders issued on 5<sup>th</sup> December 2014.

iii. Direct that the 2<sup>nd</sup> interested party pay out the money held by it in accordance with the orders of the court issued on 25<sup>th</sup> July 2013 to the respondent/applicant herein, Aviation and Airport Services Workers Union (K).

2. The petitioners in this matter are unionsable employee of Kenya Airways represented by one Stanley Kibet Suleiman Anziz and Agula Njenga. They approached court to stop deductions of Agency fees calculated at 2% of their basic salary pursuant to an agreement between the respondent Aviation and Airport Services Workers Union (K) and Kenya Airways. The Agency fees was gazetted on 10/05/2015 requiring the deduction to take effect from 1<sup>st</sup> November 2012.

3. The petitioners allege *ex parte* interim orders enjoining the 1<sup>st</sup> interested party to the suit and the impugned order;

*“That the Agency fees held by the employer of the petitioners that is Kenya Airways be and are hereby ordered to be released to the interested party,”* granted by Hon. Maureen Onyango, exported is final in nature.

4. Secondly the said order was granted to the 1<sup>st</sup> interested party who on the face of the record was not a party to the agreement on Agency fees between the respondent and the 2<sup>nd</sup> interested party, Kenya Airways Limited.

5. Thirdly, at the time, the order directing Kenya Airways Limited (the employer) to release Agency fees to the 1<sup>st</sup> interested party was made on 5<sup>th</sup> December 2014, Kenya Airways Limited (now 2<sup>nd</sup> interested party) had not been joined as a party to the suit.

6. They seek declaration;

a. That Gazette notice No. 6135 dated 2<sup>nd</sup> November 2012 and published on 10<sup>th</sup> May 2013 is invalid for failure by the respondent to have ensured there was public participation and inclusiveness of the petitioner as provided by Article 10 (2) a) and 10 (2) (b) of the Constitution.

b. That Gazette notice No. 6135 threatens the right to social security provided by Article 43 (1) (c) of the Constitution.

c. That respondent violated the right to fair labour practice provided by Article 41 (1) of the Constitution by failing to conduct public participation more so with the petitioners who are its members and form a substantial number of its membership.

7. Subsequently, Kenya Aviation Workers Union, a rival Union in the Aviation Industry and Kenya Airways Limited were joined as 1<sup>st</sup> and 2<sup>nd</sup> interested parties respectively.

8. Pursuant to an application dated 7<sup>th</sup> December 2014 and filed on 5<sup>th</sup> December 2014, Hon. Maureen Onyango, the duty Judge granted Kenya Aviation Workers Union, interim orders on 5<sup>th</sup> December 2014,

riding on petition No. 27 of 2013, which orders run counter to the prayers sought in the petition itself and could not therefore lawfully issue pursuant to an interlocutory application founded on ELRC petition No. 27 of 2013 to which the interested party had just attached itself as an interested party only to obtain final orders without giving the petitioners and the respondent, opportunity to oppose the interlocutory application seeking joinder of the 1<sup>st</sup> interested party, and the impugned final order which had the effect of negating the substratum of the pending petition.

9. I have considered the notice of motion filed on 9<sup>th</sup> December 2015 based on the grounds set out on the face of the application in paragraphs a to m and in the supporting affidavit by Mr. Bonnie Nicholas Barasa, the general secretary of the respondent/applicant.

10. I have also considered the replying affidavit sworn by the petitioners Stanley Kibet, Suleiman Aziz and Angela Njenga sworn on 26<sup>th</sup> January 2016 setting out in details why the *ex parte* interim orders granted to the 1<sup>st</sup> interested party on 5<sup>th</sup> December 2015 were a result of material non-disclosure and fraudulent conduct on the part of the 1<sup>st</sup> interested party.

11. And having also considered the oral and written submissions by the parties the court has arrived at the following conclusion of fact and law;

- i. The 1<sup>st</sup> interested party was a complete stranger to the subject matter of petition No. 27 of 2013.
- ii. That the 1<sup>st</sup> interested party could not be joined lawfully to the suit without giving opportunity to the parties to be heard.
- iii. That the 1<sup>st</sup> interested party was guilty of material non-disclosure bordering on fraud at the time, it was granted *ex parte* orders by Maureen Onyango J. on 5<sup>th</sup> December 2015 which interim orders negated the substantiation of the petition and summarily locked out the petitioners and the respondent from the suit without being heard.

12. The further effect of the interim orders of the court was to unjustly enrich the 1<sup>st</sup> interested party at the expense of the petitioners and the respondent in the petition without a sweat and without affording a hearing at all to the principal parties in the petition.

13. The court is convinced beyond doubt that the orders granted on 5<sup>th</sup> December 2015 by this court, were issued in error and in violation of the inalienable right to a fair hearing provided under Article 50 of the constitution of Kenya 2010.

14. Accordingly, this court allows this application and grants the following orders;

- i. The orders issued on 5<sup>th</sup> December 2014 by this court are set aside.
- ii. That the 2<sup>nd</sup> interested party to file and serve the particulars of payment made to the 1<sup>st</sup> interested party within thirty (30) days in accordance with the order issued by this court on 5<sup>th</sup> December 2014.
- iii. That the 2<sup>nd</sup> interested party to hold all agency fees deductions made from its unionsable employees in the past and hence forth pursuant to Gazette notice No. 6135 dated 2<sup>nd</sup> November 2012 in an escrow account in its own name until the petition is heard and determined.
- iv. That the 2<sup>nd</sup> interested party to file and serve the particulars of payment made to the 1<sup>st</sup> interested party within thirty (30) in accordance with the order issued by this court on 5<sup>th</sup> December 2014.

v. That the petition to be concluded on a priority basis.

vi. Costs in the cause.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of August, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**