



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.643 OF 2016

KENYA AVIATION WORKERS UNION.....CLAIMANT

VERSUS

BALLORE AFRICA LOGISTICS KENYA LIMITED.....RESPONDENT

AND

AVIATION & AIRPORT SERVICES

WORKERS UNION.....INTERESTED PARTY

RULING

1. There are two applications pending, one filed by the Respondent and dated 5th May 2016 and one filed by the Interested Party and dated 16th May 2016.

2. The first application filed by the Respondent on 16th May and dated 5th may 2016 is seeking for orders that;

This Court be pleased to give directions as to period of, and the mode of deduction of the Agency dues, if any, payable to the Interested Party by the Claimant's members pursuant to the ruling delivered on the 23rd February 2016.

3. The application is supported by the affidavit of **Mary Chemas** and on the grounds that there is a dispute between the Claimant and the Interested Party as to the period for which when the agency fees with respect to the CBA covering the period 2014-2015 should be effected and in view of the ruling of the Court delivered on the 24th February 2016, it is necessary that directions be given to avoid the dispute disrupting the activities of the respondent.

4. Ms Chemas also avers that as the Human Resource manager of the respondent, is aware of the Court ruling on 23rd February 2016 whose gist was that application by the Claimant was dismissed and this was challenging the notice issued by the Respondent to the members of the Claimant union to the effect that there would be a deduction of agency fees as from April 2015 for all members who were not members of the Interested Party and who were benefiting from the CBA covering the period 2014-2015 following with resignation from the membership of the Interested Party and by joining the claimant. The Court did not grant a stay of the notice pending hearing of the Claimant and this therefore stopped the Respondent from proceeding with the deductions pending the Court outcome. The claimant's application having been dismissed and the injunctive relief granted in the interim having thus been lifted the Respondent wishes to effect the deductions with respect to the CBA operative at the time and in particular for the specific

period commencing April 2015 to December 2015 when the CBA became operative.

5. That there is a dispute between the two unions with regard to when and for what period the deductions should be effected, and if so, the mode of deduction considering the fact that the same is to be deducted from the employees' salaries. Thus seek the Court to issue directions as the matter is causing a lot of disharmony between the employees in view of the rivalry of the two unions.

6. In reply, the Interested Party through the Replying Affidavit of Bonne Nicholas Barasa the Secretary General avers that by circular dated 8th April 2015 the Respondent informed its employees that in order to operationalise Legal Notice No.5027 of 6th May 2009 on the deduction of agency fees this would be effected in favour of the IP. The Legal Notice was clear. The Respondent knew what they should do with regard to the Legal Notice.

7. That the Court delivered a ruling with regard to which Legal Notice was in force and had to apply. That Legal Notice No.5027 of 2009 and Legal Notice No.6135 of 2013 are different and distinct with no ambiguity and the Court went further to rule that Legal Notice No.5027 of 2009 was valid.

8. The respondent's application seeking Court directions is thus mischievous as the Legal Notice is clear as to its date and effect. Legal Notice No.5027 of 2009 became effective on 6th May 2009 and the Respondent should therefore be directed to adhere in terms of section 49 of the Labour Relations Act. There is no dispute between the Claimant and the Interested Party with regard to the Legal Notice implementation date that the Respondent is required to abide.

Application by the IP

9. By application and Notice of Motion filed on 17th May 2016 and dated 16th May 2016, the Interested Party is seeking for orders that;

1. ...

2. *Leave be granted and is hereby granted to the applicant to institute the contempt proceedings against the Respondent and the exparte herein for disobeying a Court order duly issued by a competent court.*

3. *The Respondent be fined a sum of Kenya shillings five million (Kshs 5,000,000) for disobeying Court order duly served upon it.*

4. *An order of committal [committal] to civil jail be issued to commit exparte to a civil jail for a period not exceeding six (6) months for the disobedience of the Court order.*

5. *An order do compel the Respondent to deduct from the wages of its employees who are uninizable [unionisable] and are not members of the Interested Party an agency fees at the rate of 2% with effect from 1st January 2012 and remit to the gazette bank account of the applicant.*

10. The application is supported by the affidavit of Bonne Nicholas Barasa and on the grounds that the Interested Party signed a CBA with the Respondent in accordance with section 57 of the Labour Relations Act and when the CBA took effect, some unionisable employees who had benefitted from it were not members of the Interested Party and pursuant to section 49 of the Labour Relations Act the Minister issued Gazette Notice directing the Respondent to deduct from these employees agency fees and remit to the account of the IP. In compliance the Respondent sent out a circular dated 8th April 2015 and on the knowledge of this circular the Claimant moved the Court seeking to stop the same vide application dated 16th April 2015.

11. That the Court vide orders issued on 20th April 2015 stopped the implementation of the respondent's circular pending the hearing and determination of the application by the claimant. The Court delivered

ruling on 23rd February 2016 where the order stopping the execution of the legal notice and the respondent's circular dated 8th April 2015 were vacated and the application dismissed. The Respondent was therefore required to remit agency fees immediately the Court lifted the order and dismissed the application by the claimant.

12. The Respondent has failed to obey the Court order served upon them on 20th April 2016. The Respondent is acting contrary to the notice by the minister and the order of the court. Such is punishable in accordance to section 63 of the Civil Procedure Act and order 40 of the Civil Procedure Rules.

13. To this application, the Respondent filed Grounds of Opposition on 23rd May 2016 that the orders of the Court vide ruling delivered on 23rd February 2016 were to dismiss the claimant's application and there were no directives capable of being disobeyed and the Interested Party application is premised on a wrong basis. The Interested Party has no mandate to decide what punishment is to be visited upon the Respondent and thus cannot be allowed in its form. The application of the Interested Party seek to introduce new matters not subject of the suit herein, the CBA under reference is the one covering 2014-2015 and to introduce new issues is an effort to re-litigate such new issues herein. The Respondent has an application dated 5th May 2016 seeking Court directions on how to implement the agency fees deductions and dues to the Interested Party and thus the Interested Party application lacks merit and has no basis.

Submissions

14. To the two applications, the Claimant opted to leave matters therein between the Respondent and the Interested Party on the basis that the issues set out only relate to the two and do not involve the claimant. The Respondent and Interested Party filed their written submissions.

15. The Respondent submit that by a notice and circular dated 8th April 2015 to its employees, agency fees due to the Interested Party was to be deducted in accordance with the requisite Legal Notice noting that the Interested Party had negotiated a CBA under which members of the Claimant benefited from. That in the ruling of the Court on 23rd February 2016 this issue was not resolved and has created tension among employee and there is a threat to disruption of work hence the application seeking directions. That when the Claimant moved Court with application dated 16th April 2015, there was a stay of the agency fees deductions and the ruling of the Court was to the effect that the Respondent was justified in issuing the circular and the deductions should have therefore been done. The CBA subject to the proceedings thus has since lapsed meaning the deductions being claimed by the Interested Party will operate retrospectively.

16. The Respondent also submit that the direction sought are to guide the respect as to whether to deduct the agency fees from the salaries of the employees and if so whether such deductions should be in lump sum or what applicable formula should be used. That the agency fees due relate to salaries of its employees and since this was stopped by the court, the Respondent did not make any deductions in obedience to the Court orders.

17. The Court has residual jurisdiction which can be used in special circumstances in order to put right that which would otherwise be a clear injustice as held in **Meshallum Wanguhu versus Kamau Kania Civil Appeal No.101 of 1984 1 KLR**. That one of the instances in which this residual power is exercised is in the fulfilment of its obligations to ensure that the orders it issues are not issued in vain, this was also emphasised in **Nicholas Mahihu versus Nduma Tea Factory Ltd & Another Civil Appl.No.101 of 2009**. The Court must ensure that its orders are effective at all times.

18. The Interested Party submit that on 16th February 2015, the Claimant filed application seeking orders to stop the Respondent from deducting agency fees for the benefit of the Interested Party and in the interim such orders were granted until 23rd February 2016 when the Court dismissed the same. as the orders granted to the Claimant subsisted, the Interested Party made application dated 24th June 2015 which raised preliminary issues on account that there existed another Legal Notice No.6127 of 2013 which

revoked Legal Notice No.5027 of 2009 but the Court ruled that the valid Notice is No.5027 of 2009 general to all employers engaged with the Interested Party members and had a CBA.

19. The Interested Party also submit that at the time the Respondent issued circular on 8th April 2015 they were aware of the existence of Legal Notice No.5027 of 2009 and even before getting into a relationship and Recognition of the claimant, they ought to have deducted and remitted dues owed to the Interested Party in accordance with section 48 of the Labour Relations Act.

20. The Interested Party challenge the Respondent argument that implementation of the agency fees should take effect from the time the Respondent entered into a recognition of the claimant. The recognition of the Claimant has no correlation with the deduction of agency fees due to the Interested Party as section 49 requires the Minister to issue notice with regard to a trade union with a CBA with an employer which was done in the case of the Interested Party and respondent.

21. That where an employer has benefited from a CBA with high productivity of employees, the law allows deduction of union dues and or agency fees retrogressively. This is to limit salary disparities between employees who are members of the union and those who are not. Members of the Interested Party were deducted membership fees each month to finance the CBA that benefited all unionisable employees and the same becomes a debt to be serviced by those employees who refused to become members. This is the position under section 57 [49] of the Labour Relations Act and agency fees is due to the Interested Party from 1st June 2009 until it has been substituted with the May 2016 CBA signed between the Claimant and the respondent.

22. That the effect of the Court ruling on 23rd February 2016 is that parties reverted back to the position of Legal Notice No.5027 of 2009 when the Interested Party was entitled to agency fees.

Determination

23. Section 49 of the Labour Relations Act must be read together with article 36 and 41 of the constitution. On agency fees, the Labour Relations Act provides that

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.

24. Such provisions cannot be divorced from the right to association under article 36 of the constitution;

36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

25. And further, the right to unionise and ensure fair labour relation under article 41(1) and (2) of the constitution;

41. (1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) ...

(b) ...

(c) to form, join or participate in the activities and programmes of a trade union; and

26. Agency fees where due is payable but such a right cannot be used to negate a fundamental right set out under the constitution. The context of each case must be put into account as agency fee relates to a deduction from an employee's salary or wage and remitted to the union enjoying a CBA with the employer which union the employee has not joined. To put it more succinctly, the Interested Party submitted at paragraph 8 that;

...CBA have always been implemented retrogressively. The agency fees as introduced in the law was meant to limit salaries disparities between employees who are members of a union and those who are not members. The members of the interested part funded the Collective Bargaining Agreements and which those employees benefited. Members if the Interested Party were deducted membership fees each month to finance a CBA that benefited all unionisable employees and the same became a debt to be serviced by those employees who refused to become members.

27. The suit herein commenced by the Claimant and the Notice of Motion of 16th April 2016 related to the deduction of agency fees that the Respondent was to enforce through its circular of 8th April 2015. The Claimant having moved the Court thus and on good basis and noting the grounds and affidavit in support of the orders sought in the interim, there was found a good foundation and basis to issue interim orders pending the hearing and determination of the matters presented before the court. Indeed both the Claimant and the Respondent were able to attend and in the process, the Interested Party sought to be enjoined in the proceeding to shed more light into the matter and was allowed. This culminated in several rulings herein and now on record.

28. The interim orders based on the claimant's application of 16th April 2015 were lawful orders of the Court issued to ensure that all parties were given a fair hearing. The stoppage of the circular by the Respondent on the deduction of agency fees to be remitted to the Interested Party was thus a lawful order that cannot be visited against the Respondent or the members of the claimant. Though application dated 16th April 2015 has since been dismissed, the issues raised therein required an analysis of all the matters presented before Court and hence the ruling dismissing the same. The orders issued on 20th April 2015 were vacated and the application dismissed. The Court went further to note that the parties to the suit – claimant, Respondent and Interested Party – had abided by the Court orders, interim orders issued on 20th April 2015 with regard to the claimant's application dated 16th April 2015.

29. At no time was the Court ever moved to directed or compel the Respondent to continue with deduction of agency fees and deposit this with the Court or place such fees into an account. The employees who had benefited from the applicable CBA continued to enjoy its benefits without any deduction. Such monies were therefore never collected as the process of hearing of the application dated 16th April 2015 was ongoing.

30. I take it that such fees have since accumulated and the demand that this be paid at 2% and deducted from the subject employees *who refused to join the* Interested Party will lead to astronomical figures. The subject agency fees is demanded from 2009 to May 2016 vide Legal Notice 5027 of 2009.

31. It is noteworthy that up an until 8th April 2015, when the Respondent issued its circular to deduct the agency fees, the Interested Party remained silent as far as demanding for the same is concerned. The suit herein having been filed by the claimant, the Interested Party only joined to assert its rights but nothing had stopped the Interested Party from demanding the agency fees before this circular of 8th April 2015 was issued.

32. Where the Respondent was found to be on the wrong, which is not the case here, such fees and dues should be paid from their accounts. But in this case, the employees not members of the Interested Party received their wages and salaries without any deduction of agency fees and the Court has since made a finding. Such employees should not be sanctioned with a back wage deduction on account of the failures of the Interested Party as these were dues the Interested Party ought to have claimed from 2009 and by

2015 when the suit herein was filed had not asserted such a right.

33. As such, to seek the fees owing from the Respondent employees backwards and going to 2009 to May 2016 and in the Court reading of the provisions of article 36 and 41 with regard to the right to association and right of an employee to join a trade union of their choice, it would be grossly punitive at this stage to require the employees to repay such fees/monies in the context of all matters set out in this case. The delay by the Interested Party in seeking such fees, the amounts involved having to be drawn from the employees' salaries or wages and the time period to be covered from 2009 to 2016, the demands by the Interested Party are way too extreme.

34. When the agency fees became due on 1st June 2009, nothing stopped the Interested Party from demanding for the deduction and remittance of the same by the respondent. To wait until suit is filed by the Claimant on 20th April 2015 so as to be enjoined herein to demand for such dues from the Claimant members on the basis that they refused to join the Interested Party so as to avoid the agency fees and pay for membership is a practice if endorsed by the Court would lead to gross injustice to the employees of the respondent. Where there was a benefit due to the work of the Interested Party and for ensuring that there was a CBA, the Interested Party should have moved with haste and assert its right to an agency fees. To stand back and wait for over seven (7) years to lodge such a claim is way too late in the day. The deduction of the agency fees from the employees at this stage would require that they repay the same and go home with no salary for several months. This is not the intention of the drafters of the Labour Relations Act when section 49 was formulated and more so putting into account since 2007 when the Labour Relations Act was enacted, in 2010 the Constitution created and expanded the Bill of Rights to cover fair labour relations in matters such as this one.

35. I take note of the decision of the Court in **Mashallum Wanguhu versus Kamau Kania**, cited above and further the findings of the Court in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

The Court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a Court of law. The overriding feature of the inherent jurisdiction of the Court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the Court enables the Court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the Court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [Emphasis added].

36. Court is therefore entitled to take appropriate measures to right the wrong in order to send a strong message that jurisdiction cannot be used to abuse employee's right(s) even on the face of the demand for agency fees due. The Interested Party even where they have a right to demand the deduction and remittance of agency fees over a CBA they have negotiated and the subject employees are beneficiary, such a right should be asserted without delay and without infringing of the rights of the employees. It would be wholly rash for the Court to direct the deduction of such agency fees after 7 years and leave the beneficiary employees with no livelihood for several months. Such would lead to undesired results at the Respondent work place not envisaged in these proceedings.

37. As such, the directions sought by the Respondent with regard to the mode, manner and modalities of wage deductions to cover the Interested Party for the due agency fees does not arise. To make such

directions as requested and applied for by the Respondent would be to use the Court in impoverishing employees some of who have enjoyed the non-deduction of agency fees for over 7 years.

38. No employee of the Respondent should suffer a pay deduction with regard to agency fees as relates to Legal Notice No.5027 of 2009. To make such an order would be to entrench an unfair labour practice as this point and time.

39. With regard to the orders of committal and penalisation of the Respondent with regard to the orders of the court, as noted above, the interim orders subsisting from 20th April 2015 were issued by the Court on good basis. To punish the Respondent with regard to the same would not serve any useful purpose. As noted above, agency fees due with regard to Legal Notice No.5027 of 2009 is made late in the day, this is not due and should not be subject of committal proceedings against the respondent.

In conclusion, the two applications by the Respondent and Interested Party respectively and dated 5th May 2016 and 16th May 2016 shall not be allowed save that, no agency fees is payable from the Respondent employees with regard to Legal Notice No.5027 of 2009 as the same is overtaken by time and grossly unfair on the employees of the Respondent to demand. Each party shall bear own costs.

Delivered in open court at Nairobi this 17th day of November 2016.

M. MBARU

JUDGE

In the presence of.....

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