



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 387 OF 2015

KENYA NATIONAL UNION OF NURSESCLAIMANT

VERSUS

HON. SAMUEL KAMBI KAZUNGU (CABINET SECRETARY,

MINISTRY OF LABOUR, SOCIAL SECURITY AND SERVICES....1ST RESPONDENT

HON. ATTORNEY GENERAL2ND RESPONDENT

UNION OF KENYA CIVIL SERVANTS3RD RESPONDENT

THE CABINET SECRETARY FOR HEALTH4TH RESPONDENT

COUNCIL OF GOVERNORS5TH RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 7th July, 2015)

RULING

1. The application before court is the one dated 13/3/2015 and is brought under Certificate of Urgency seeking orders:

1. *That this application be certified as urgent to be heard exparte in the first instance.*
2. *That the Honourable Court be pleased to order the stay of the implementation of the Kenya Gazette Supplement No. 19 dated 20th February 2015 upon the members of Kenya National Union of Nurses pending the hearing and determination of this Application.*
3. *That the Honourable Court be pleased to stay the implementation of the deduction of Agency Fees upon the members of Kenya National Union of Nurses pending the hearing and determination of this Application.*
4. *That the Honourable Court be pleased to order the stay of the implementation of the Kenya Gazette Supplement No. 19 dated 20th February 2015 upon the members of Kenya National Union of Nurses pending the hearing and determination of the main suit.*
5. *That the Honourable Court be pleased to stay the implementation of the deduction of Agency Fees upon the members of Kenya National Union of Nurses pending the hearing and*

determination of the main suit.

6. *That the Honourable Court be pleased to grant any other relief it may deem fit and just to grant in the circumstances pending the hearing and determination of this Application.*
7. *That the Honourable Court be pleased to order the 1st Respondent to pay the costs of this application.*

2. The application is grounded upon the following grounds:

- a. *That the Claimant Union was registered on the 19th April, 2013 and it takes care of interests of its members, (Nurses) in both the private and public sector.*
- b. *That the 1st Respondent has issued a Special issue of a Kenya Gazette Supplement No. 19 dated 20th February 2015 in which he has gazetted Agency fees to be deducted from All Civil Servants who benefited from a purported Collective Bargaining Agreement (C.B.A) between the Government and the Union of Kenya Civil Servants (3rd Respondent).*
- c. *That 4th and 5th Respondents being employers of the members of the Claimant Union have been directed via the said Gazette Supplement No. 19 dated 20th February 2015 to effect the deduction of Agency fees to the entire public service including the members of the Claimant Union who have not benefited from the negotiated C.B.A.*
- d. *That Nurses who are members of the Claimant Union are public servants and therefore they stand to suffer if the Kenya Gazette Supplement No. 19 dated 20th February 2015 is implemented and effected upon them.*
- e. *That the implementation of the deduction of Agency fees upon the members of the Claimant/Applicant Union, will expose KNUN members to huge economic suffering and it will create confusion and pandemonium in the Union and the Labour Industry at large.*
- f. *That the That the implementation of the deduction of Agency fees upon the members of the Claimant/Applicant Union will go against the spirit of Section 4 (1) of the Labour Relations Act and Article 41 of the constitution which gives the members of the Claimant/Applicant the right to join and leave a Trade Union.*

3. The application is also supported by the supporting affidavit of Maratan Sarah the Deputy Chief Industrial Relations Officer of the Claimant/Applicant Union herein.

4. The Applicants are contending the collection of agency fees which has been brought through a special issue of Gazette Supplement No. 19 of 20/2/2015.

The Applicants contend that they have registered her members who pay union dues to her yet the Gazette notice is directed to all Civil Servants who are purported to have benefited from a purported negotiation between the 3rd Respondent and the Government.

5. The Applicants also contend that there is no valid Collective Bargaining Agreement between the 3rd Respondent and the Government and even assuming that there is a valid Collective Bargaining Agreement, a request must be made to the employer for collection of agency fees and then the union must produce a list of beneficiaries from whom the same should apply in line with Section 49 (2) of Labour Relations Act.

6. The Applicants have submitted that there is no list of members supplied to date yet the Minister has gone ahead and registered collection of agency fees.

7. It is also the Applicants position that there is a ruling in respect of cause 1570 of 2013 (Annex SM 7) by Justice Nduma which has already dealt with this issue by stating that ***“the Interested Party (who is 3rd Respondent herein) should exercise good faith and refrain from unduly benefiting from members who have willfully chosen to migrate to the Applicant union (Kenya National Union of Nurses, the subject of the dispute and had in fact deducted and remitted to the Interested Party Union dues for one month”.***
8. This ruling is still in force and there is also another ruling by Judge Marete on the same issue and which has not been varied to date.
9. In respect of other Respondents vis 5th Respondent, the Council of Governors herein, the Applicants have submitted that they have no interest in this matter.
10. The 3rd Respondent opposed this application. They relied on their replying affidavit dated 23/3/2013 sworn by Tom Odege the Secretary General of the 3rd Respondent filed the same day.

They submitted that the key grounds raised by the Applicants in their application is that they have a Collective Bargaining Agreement awaiting signing i.e. a draft Collective Bargaining Agreement and that therefore there is no Collective Bargaining Agreement between the Claimant and the Government and that the last Collective Bargaining Agreement expired on 30/6/2013 as per Appendix SM 4 (page 68) of application.

The 3rd Respondents aver that they have a Collective Bargaining Agreement that existed prior to 2013 and which benefitted others and that is why they are asking for agency fees as all benefits enjoyed were by the Collective Bargaining Agreement negotiated with 3rd Respondent and Government and that the Nurses benefitted and their union only came in, in 2013.

11. On the ruling on page 100 in cause 1570 of 2013, they submitted that it was based on an Interlocutory application which was dismissed and cause 1570 of 2013 was withdrawn on 30/1/2015 and orders therein negated. They also submitted that since the Claimants do not have a signed Collective Bargaining Agreement with the Government, they are benefiting from what was negotiated by the 3rd Respondent. They ask court to dismiss this application.
12. The 5th Respondent relied on their replying affidavit sworn on 14/5/2015 by Isaac Ruto. They submitted that they do not stand to suffer loss or gain when agency fees is collected but they submitted that Claimant members are currently enjoying benefits of Collective Bargaining Agreement negotiated with the 3rd Respondent and their negotiated Collective Bargaining Agreement is pending signing for over 2 years. With the devolution of health to counties, the 5th Respondent submitted that the Applicants will have to renegotiate with individual counties and therefore to the 5th Respondent the collection of agency fees by 3rd Respondent is in order. They ask court to dismiss the application.

The Applicants reiterated that the list of beneficiaries has not been produced and minutes are not Collective Bargaining Agreements.

13. I have considered the submissions of the parties. In seeking to resolve this dispute, the point of convergence is Section 49 (1) of the Labour Relations Act which provides when agency fees can be collected. This is collectable by a trade union which has concluded a Collective Bargaining Agreement registered by the Industrial Court with an employer, group of employers or an employer's organization parameters to be met before the collection are set out in Section 49 (2) to 49 (6) of the Labour Relation Act which states as follows:

1. ***A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers' organisation, 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.

2. ***A request in accordance with subsection (1) shall:***
 - a. ***be signed by the authorized representatives of the trade union and employer, group of employers or employers' organisation;***
 - b. ***supply a list of all employees prepared by the employer in respect of whom a deduction shall be made;***
 - c. ***specify the amount of the agency fee, which may not exceed the applicable trade union dues; and***
 - d. ***specify the trade union account into which the dues shall be paid.***
3. ***An employer in respect of whom the Minister has issued an order as specified in subsection (1) shall commence deducting agency fees from the employees named in the Minister's notice within thirty days of receiving the Minister's notice.***
4. ***The Minister may vary an order issued under this section on application by the trade union and the employer, group of employers or employers' organisation concerned.***
5. ***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.***
6. ***If a collective agreement is implemented retrospectively after registration by the Industrial Court, the agency fee shall be deducted and paid to the trade union for the period of retrospective implementation in accordance with this section.***

14. As the case stands, neither the Applicant nor the 3rd Respondent have any registered Collective Bargaining Agreement with the Government from the period July 2013 following the circular from Salaries Remuneration Commission dated 4/7/2012 (paragraph (iv)). They cannot therefore seek to enforce collection of agency fees at this point. It is for this reason that both the Applicant and 3rd Respondent must seek to renegotiate on this issue before any agency fees is deducted. The parameters of such a move can only be agreed upon with finality after hearing this claim to conclusion.

15. As submitted by Applicants, the list of employees to be deducted agency fees has not been provided to date as envisaged under the law. The replying affidavit of the 2nd Respondent is clear on the events culminating in the special issue of gazette notice authorizing deduction of agency fees. The law has not been complied with and it is therefore premature to order that deduction of agency fees.

16. I therefore find that the Applicants have established a prima facie case warranting issuance of orders sought. I therefore grant order in terms of prayer 4 and 5.

Costs in the course.

Read in open Court this 7th day of July, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ashubwe for Applicants – Present

Nzioka holding brief for Wanyama for 5th Respondent – Present