REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 5 OF 2013

(Formerly Petition No. 1964 OF 2011)

AND

INDUSTRIAL COURT CAUSE NO. 1964 OF 2011

KENYA HOTELS AND ALLIED WORKERS UNION …….....
PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL …….....……
1ST RESPONDENT

KENYA ASSOCIATION OF HOTELKEEPERS AND CATERERS …… 2ND RESPONDENT

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONALINSTITUTIONS, HOSPITALS &

ALLIED WORKERS…….....……..3RD RESPONDENT

THE REGISTRAR OF TRADE UNIONS …….....……..……4TH RESPONDENT

HELEKIAH OGANYO MARENYA)

RICHARD NJONI) …….....……..….. INTERESTED PARTIES

PATRICK KINUTHIA)

JUDGMENT

Background

This matter was commenced by a Statement of Claim dated and filed on 21st November, 2011 by Kenya

Hotels and Allied Workers Union, the Claimant. In the Statement of Claim the Claimant sought the following remedies:-

1. **Declarations**:

(a) Declaration that the Claimant's members' right to fair labour practices enshrined in Article 41(1) of the Constitution has been violated,

(b) Declaration that "agency fee" is a deprivation of the Claimant's members' right to private property enshrined in Article 40 of the Constitution has been violated,

(c) Declaration that the High Court has no jurisdiction to hear and determine the following cases:-

i) JR. MISC. APLLICATION NO. 430 OF 2009

ii) MISC APPL. NO. 138 OF 2007

iii) JR MISC. APPLICATION NO. 235 OF 2005

iv) JR MISC. APPL. NO. 1349 OF 2005

v) PETITION NO. 384 OF 2009

vi) PETITION NO. 405 OF 2009

vii) MISC APPLICTION NO. 144 OF 2010 (MOMBASA)

viii) HCCC NO. 467 OF 2009 together with cases consolidated therein.

2. **Orders**

a) An order revoking Gazette Notice No. 2911 of 27th March, 2009,

b) An order directed at the First, Second and Third Respondents to refund to the Claimant's members all sums so far deducted from them under the guise of "*agency fee*" and "*service charge"*,

c) An order directed to Registrar of Trade Unions to strike out the words "*hotels, restaurant, casinos, catering and similar establishments providing lodging, food, beverages and further categories of related establishments providing tourism services, clubs, guest houses, camping sites and golf clubs"* from the Constitution of the third Respondent,

d) An order compelling the Second Respondent to sign a Recognition Agreement and negotiate a Collective Bargaining Agreement with the Claimant,

e) An order setting aside Industrial Court Collective Bargaining Agreement No.142 of 2010.

3. That pending the hearing and determination of this claim;

a) An order staying Gazette Notice No. 2911,

b) An order restraining the Second Respondent or any hotelier or its members and the third Respondent from deducting the *"agency fee"* and *"0.5% of the service charge"*,

c) An order of stay of Collective Bargaining Agreement RCA 142 of 2010,

d) An order restraining the Minister for Labour from assessing any Collective Bargaining Agreement between the second and third Respondents and formal disputes submitted by the second Respondent.

The Statement of Claim was filed together with a Notice of Motion under certificate of urgency seeking the following orders:

1. That this application be certified as urgent in the first instance,
2. That pending the hearing and determination of this claim, this Honourable Court may be pleased to grant the following conservatory orders-

a) An order staying Gazette Notice No. 2911,

b) An order restraining the second Respondent or any hotelier or any of its members and the third Respondent from deducting the *"agency fee" and "0.5% of the service charge"*,

3. That the court do give directions on who should be served,

4. That this Honourable Court may be pleased to certify that this claim raises the following constitutional issues:-

a) Whether or not the deduction of Kshs.150/= and 0.5% services charge from the Claimant's members violates Section 40 of the Constitution.

b) Whether or not, the entertainment by the High Court of:-

i) JR MISC APPLICATION NO. 430 OF 2009

ii) MISC APPL. NO. 138 OF 2009

iii) JR. MISC. APPLICATION NO. 235 OF 2005

iv) JR MISC. APPL. NO. 1349 OF 2005

v) PETITION NO. 384 OF 2009

vi) PETITION NO. 405 OF 2009

vii) MISC. APPLICATION NO. 144 OF 2010 (MOMBASA)

viii) HCC NO. 467 OF 2009 together with cases consolidated therein and the disputes under Section 12 of the Industrial Court Act violate Article 165 of Constitution.

c) Whether or not the Respondents' actions violate the Claimant's members' right to fair labour practices enshrined in Article 41 of the Constitution

5. That this file be placed before the Honourable Chief Justice for directions:

a) On the appointment of the Bench, place and the hearing of the constitutional issues raised herein,

b) For stay of proceedings in and placing before the same Bench, all the following cases:-

i) JR MISC APPLICATION NO. 430 OF 2009

ii) MISC APPL. NO. 138 OF 2009

iii) JR. MISC. APPLICATION NO. 235 OF 2005

iv) JR MISC. APPL. NO. 1349 OF 2005

v) PETITION NO. 384 OF 2009

vi) PETITION NO. 405 OF 2009

vii) MISC. APPLICATION NO. 144 OF 2010 (MOMBASA)

viii) HICC NO. 467 OF 2009 together with cases consolidated therein.

On 28th November, 2011 Mr. Wati, Counsel for the Claimant appeared before Mukunya **J** (as he then was) ex parte and was directed to serve the application on the Respondents. The application was fixed for *inter partes* hearing on 8th December, 2011.

On 8th December, 2011 Mr. Wati again appeared before Mukunya **J** but there was no appearance for any of the Respondents who Mr. Wati informed the court had been served and an affidavit of service filed in court. **Mukunya J** directed that the file be placed before the Honourable Chief Justice as prayed in prayer No. 5 of the Notice of Motion for appointment of a bench of three judges to hear the application on merit.

On 16th December, 2011 the Claimant filed a Notice of Motion under certificate of urgency seeking leave to amend the statement of claim to substitute the Minister for Labour, the first Respondent, with the Honourable Attorney General. Counsel for the Claimant appeared before Mukunya J *exparte* on 28th December, 2011 and was granted the orders to substitute the first Respondent. The court reiterated the directions to place the file before the Honourable Chief Justice.

On 9th January, 2012, the Honourable Chief Justice directed that the file be placed before the Head of the Constitutional and Human Rights Division of the High Court who would allocate the file to one of the judges in the Division to hear the matter. The file was sent to the Division and registered as Petition No. 1964 of 2011.

The file was mentioned by Lenaola **J** on 23rd March, 2012 and he directed that the matter be mentioned again on 11th May, 2012 for further directions. He also granted prayer No. 5 (b) of the application dated 21st November, 2011 pending hearing of the application *inter partes* and ordered the Petition and pleadings served on all the Respondents.

The Petition was mentioned on 11th and 17th May, 2012 when further directions were given.

On 30th May, 2012 the 3rd Respondent filed a Notice of Motion under certificate of urgency praying for temporary stay and setting aside of the temporary orders granted on 17th May, 2012. The application was heard by Ogola **J** on 31st May, 2012 and he granted an order of temporary stay of the orders of 17th May, 2012.

The file was thereafter mentioned severally before Mumbi **Ngugi J** and **Lenaola J**. On 31st July, 2012 **Lenaola J**, with the consent of the parties directed that the file be placed before the Honourable Chief Justice to constitute a bench of 3 Judges under Article 165 (4). On 3rd August, 2012 the Chief Justice constituted a panel of Lenaola **J** (presiding), Mumbi **Ngugi J** and Majanja **J** to hear the petition.

On 27th September, 2012 the 3 judge bench mentioned the Petition and gave directions that Respondents file their Responses to the Petition within 21 days and thereafter file written submissions. The court fixed the Petition for hearing on 15th November, 2012.

When the Petition came up for hearing on 15th November, 2012, Ms Guserwa appearing for the Second Respondent informed the court that she was not aware of Petition No. 1964 of 2011 and there was nothing to be heard by the court. She sought directions that the matter be heard in the Industrial Court (now Employment and Labour Relations Court). With the concurrence of Counsels for the Claimant, 3rd Respondent and Interested Parties the Court ruled that it had no jurisdiction pursuant to the provisions of Article 162 (2) and directed that this matter together with Petitions No. 379 of 2008, 384 of 2009 and 430 of 2011 be referred to the Honourable Chief Justice to constitute a bench of the Industrial Court to hear and determine this matter and the three petitions.

On 18th December, 2012, the Chief Justice constituted a bench comprising **Nduma J** (presiding) **Onyango J** and **Ndolo J** to hear the matter.

The file was sent to this Court and registered as Petition No. 5 of 2013.

It has been necessary to set out the background of this case in detail for two reasons. The first is that there has been confusion whether this is a petition or a claim. From the foregoing history, it is clear that it is a claim filed by Statement of Claim dated 21st November, 2011 as amended on 30th December, 2011.

The second reason is that the Petitioner (who in reality is the Claimant) has alluded to orders having been issued staying Gazette Notice No. 2911 while the Respondents have insisted that the orders were set aside. The correct position is that neither the Claimant's application dated 21st November, 2011 nor the 3rd Respondent's application dated 30th May, 2012 were ever heard *inter partes* or disposed of in any other manner. The two applications therefore lapsed for want of prosecution.

After several mentions at which directions were taken and several hearing dates when the case could not take off for various reasons, the hearing of this case proceeded on 8th April, 2014 and 8th July, 2015 when the parties highlighted their written submissions.

The Claimant's case is contained in the Statement of Claim dated 21st November, 2011 and the Amended Statement of Claim dated 30th December, 2011. The Claimant filed written submissions dated 12th October, 2012. The submissions were highlighted by Claimant's Counsel Mr. Wati on 8th April, 2014.

The 1st and 4th Respondents being the Honourable Attorney General and the Registrar of Trade Unions respectively filed grounds of opposition on 23rd July, 2013 and written submissions on 24th February, 2014. .

The 2nd Respondent filed a Replying Affidavit sworn by Mike Macharia, its Chief Executive Officer, on 7th June, 2013. It filed written submissions dated 14th October, 2013.

The 3rd Respondent filed written submissions dated 7th October, 2013.

On 12th June 2012 Helekiah Oganyo Marenya, Richard Njoni and Patrick Kinuthia Karanja applied to be enjoined as 3rd parties. Their application was allowed by consent. On 13th November 2012 the interested parties filed a replying affidavit of Helekiah Oganyo Marenya in response to the claim together with their written submissions.

Claimant's Case

The Claimant is a Trade Union registered in 1999 under the Trade Unions Act (now repealed) to represent employees in hotels, restaurants, casinos and establishments providing lodging and food beverages, tourism services, clubs, guest houses, camping sites and golf clubs. Prior to its registration the sector was covered by the 3rd Respondent, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers. Many employers in the sector had joined the membership of the Kenya Association of Hotel Keepers and Caterers, the 2nd Respondent through whom they had been negotiating for terms and conditions of their workers following the signing of a Recognition Agreement between the 2nd and 3rd Respondents in 1969. Having been duly registered, the Claimant commenced recruitment of

members. This created a situation where there were two different trade unions operating in the same sector.

With time the Claimant managed to recruit a simple majority in several establishments which were members of the 2nd Respondent and whose employees were covered by the terms in the collective bargaining agreement registered between the 2nd and 3rd Respondents. The Claimant went to court and was granted recognition by the court in some of the establishments including Musiara Limited (the subject of Cause 56 of 2007), Tea Hotel, Kericho (Cause No. 36 of 2007), Grand Regency Hotel (Cause No. 39 of 2007), Hotel Inter-Continental (Cause No. 67 of 2007), Southern Palms Hotel (Cause 120 of 2005), Mukawa (Hotels) Holdings Ltd T/A Nairobi Safari Club(Cause No 105 of 2005), Nairobi Serena Hotel (Cause 41 of 2007), Norfolk Hotel (Cause 48 of 2007), Almanara Luxury Beach Resort (Mombasa Cause No. 272 (N) of 2009), Nairobi Gymkhana (Cause 90 of 2006), African Safari Club (Cause 769(N) of 2009) (Fairview Hotel (Cause 40 of 2007). The Industrial Court while ordering recognition of the Claimant in these cases also ordered nullification of the recognition agreements between the 2nd and 3rd Respondents in respect of the said establishments. However, the court directed that the collective bargaining agreement in force at the time subsists to its expiry date on 30th June, 2010, in Causes No. 56 of 2007, 36 of 2007 and 39 of 2007.

Several establishments challenged the decisions of the Industrial Court directing recognition of the Claimant and nullifying the recognition agreements by way of either judicial review or constitutional applications in the High Court. These included Kericho Tea Hotel (JR No. 235 of 2005) Musiara Ltd (JR 56 of 2007), Kenya Association of Hotel Keepers and Caterers Association (JR 430 of 2009), Southern Palms (JR No. 138 of 2007) Mukawa Hotels T/A Nairobi Safari Club (JR 1349 of 2005), Nairobi Serena (Petition No. 384 of 2009) and Almanara Luxury Beach Resort Mombasa (Mombasa JR 144 of 2010), among others.

On 30th June, 2010, the Industrial Court registered a new Collective Bargaining Agreement (CBA) between the 2nd and 3rd Respondents as RCA No. 142 of 2010. The CBA was to run for the period 1st July, 2010 to 30th June, 2012. The Claimant avers that this was in contempt of the court orders in which the same court had nullified the Recognition Agreement between the 2nd and 3rd Respondents and directed that they should not negotiate any new CBA.

The Claimant avers that following the registration of the CBA on 30th June, 2010 the 3rd Respondent applied for gazettement of agency fees and the Minister for Labour did so under Gazette Notice No. 2911. Thereafter the 3rd Respondent started levying agency fees on the Claimant's members who were already paying union dues to the Claimant thus subjecting them to double deductions. The Claimant avers that this has frustrated its members who have been forced to withdraw from its membership to avoid double deduction of union dues for the Claimant and agency fees for the 3rd Respondent. The Claimant argues that this has deprived it of revenue while at the same time depriving its members of property in contravention of Article 40 of the Constitution by making them pay dues to a union in which they are not members.

The Claimant further alleges collusion between the Minister for Labour and the Industrial Court in the registration of the CBA RCA No. 142 of 2010 as both the Minister and the Court were aware of the court order nullifying the Recognition Agreement between the 2nd and 3rd Respondents and prohibiting negotiation of any CBA upon expiry of the CBA for the period ending 30th June, 2010.

The 4th Respondent, the Registrar of Trade Unions is accused by the Claimant of failing to amend the constitution of the 3rd Respondent to remove the words "*hotels, restaurants, casinos, camp sites, catering and similar establishments providing lodging, food, beverages or both and further categories of related establishments providing tourism services, clubs, guest houses, camping sites and golf clubs* " as ordered by the Industrial Court in the cases in which it nullified the recognition agreement between 2nd and 3rd Respondent.

The Claimant's further complaint in this claim is that the 2nd and 3rd Respondents have been deducting 0.5% of its members' income for service charge and depositing it into account number 1080296157711 at

Equity Bank, Mombasa Road Branch which the 2nd and 3rd Respondents use for educational seminars for the 2nd and 3rd Respondents' managers. The Claimant alleges this is a contravention of Sections 39 and 50(8), (9) and (10) of the Labour Relations Act which provide for objects for which union deductions may be used and the payment of union dues into a designated union account.

The Claimant relied on the following authorities:-

1. *The Constitution of Kenya*
2. *The Labour Institutions Act, 2007 and the Industrial Court Act, 2010*
3. *The constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (Gicheru Rules).*
4. *High Court Miscellaneous Application No. 855 of 2005 - Republic - v Industrial Court Ex-parte Nakumatt Holdings Limited.*
5. *High Court Miscellaneous Application Number 1159 of 2003 - Kenya Guards and Allied Workers Union - v - Security Guards Services and 38 others.*
6. *High Court Miscellaneous Application Number 254 of 2001 - Kenya Airways - v - Kenya Airline Pilot Association.*
7. *High Court Miscellaneous Application Number 1270 of 2007 - Kenya Hotel Keepers and Catering Association - v - the Industrial Court of Kenya.*
8. *High Court Miscellaneous Application Number 933 of 2005 - Kenya Union of Commercial Food and Allied Workers Union - v - Kenya Planters Cooperative Union Limited*
9. *Civil Appeal Number 119 of 2001 - Rashid Odhiambo Aloggoh & 245 others - v Haco Industries Limited.*
10. *Petition Number 405 of 2009 - Fairmont the Norfolk Hotel - v - The Industrial Court.*
11. *HCCC Number 10 of 1999 - Elijah Musembei & 6 others - v - The Registrar of Trade Unions.*
12. *Keeping the Republic by Christine Barbour & Gerald C. Wright - "interest groups" pages 557 - 599.*

Mr. Wati on behalf of the Claimant referred to the conflicting decisions of the High Court on whether or not the High Court has jurisdiction to supervise the Industrial Court and concluded that this has now been resolved by Article 162(2) of the Constitution as read with Article 165(5)(b).

Mr. Wati prayed that the Court grants the declarations and further remedies as prayed in the Statement of Claim.

1st and 4th Respondents' Case

The 1st and 4th Respondents in their written submissions filed through the Attorney General's office aver that the issue of jurisdiction is settled by Articles 162(2) and 165(5) which provide that the High Court shall not have jurisdiction to determine matters falling under the jurisdiction of courts established under Article 162(2). Senior State Counsel Mr. Siro for the 1st and 4th Respondents submitted that the issue of jurisdiction is now settled by the decisions in the case of *Kenyatta University v The Industrial Court of Kenya [2012] eKLR* and *USIU v Attorney General [2012] eKLR*.

On deduction of agency fees and service charge Mr. Siro submitted that the Minister for Labour is mandated by Section 49 of the Labour Relations Act to order payment of agency fees. He submitted that the Minister and the Registrar of Trade Unions acted within their mandates as donated by statute and that unless the law is amended the Claimant cannot purport to stop them from exercising their mandates under the Act.

At the hearing Mr. Siro reiterated the contents of the written submissions.

2nd Respondent's Case

In the replying affidavit of Mike Macharia for the 2nd Respondent and in the submissions filed on behalf of the 2nd Respondent, it is stated that the Claimant is a new union having been registered in the sector

where the 2nd and 3rd Respondents had a long history of negotiations, that Article 41 of the Constitution protected both employees' and employers' right of association and that agency fees is authorised by law. It is submitted that the rights of employees do not override the rights of employers. It is further submitted that the Claimant's actions have resulted in confusion in the industry and that the Claimant has not achieved a simple majority to qualify to be accorded recognition.

The 2nd Respondent submitted that the issue of jurisdiction is now resolved and that the various cases pending in the High Court should be heard at this Court and determined individually on their merit.

While highlighting the submissions of the 2nd Respondent, Ms Guserwa stated that the Claimant must either recruit a simple majority of the 2nd Respondent's members who number about 195 hotels, or a simple majority of all the employees of the 195 hotels put together, before it can quality for recognition. Ms Guserwa conceded that some of the 2nd Respondent' members have been ordered by the court to recognise the Claimant and have signed recognition agreements with the Claimant. She submitted that the recognition agreements signed by virtue of the court orders remain valid and are not the subject of this case.

On service charge Ms. Guserwa submitted that service charge is used for educational seminars for both employers and employees and benefits both.

She urged the Court to dismiss the Claim as it has not been proved.

3rd Respondent's Case

For the 3rd Respondent, Mr. Ongoto associated himself with the position of the 2nd Respondent. He submitted that the Claimant who has failed to recruit a simple majority is attempting to achieve recognition through the Court. Counsel added that the Claimant wants the 2nd Respondent to be excluded from the industry to eliminate competition. He reiterated the position of the other Respondents on jurisdiction, agency fees and service charge. Mr. Ongoto relied on the case of ***Kenya Union of National Research Institutes Staff of Kenya v KARI [2003] eKLR*** where it was held that the union must recruit a simple majority to be entitled to recognition. He also relied on the case of ***USIU v Attorney General*** (supra) in which the issue of jurisdiction of this court vis-a-vis the High Court was determined.

Mr. Ongoto urged the court to dismiss the claim.

Interested Parties' case

The Interested Parties in the replying affidavit sworn by Helekiah Oganyo Marenya and in their submissions state that they are employees of Hilton Hotel and members of the 3rd Respondent. Their counsel reiterated the arguments on jurisdiction and agency fees as submitted by the Respondents. The Interested Parties submitted that in the fight between the two unions it is the employees who are suffering and will be the ultimate losers. They relied on ILO Convention numbers 87 and 98. They submitted that as employees they have an unfettered right to freedom of association and to join a union of their choice.

They further submitted that the Claimant has not garnered a simple majority to be accorded recognition and have not demonstrated that they have been denied access to recruit members. They urged the court to dismiss the claim.

Issues for Determination

The issues arising for determination from the foregoing are in our opinion the following:-

1. Jurisdiction of the High Court to hear Judicial Review and Petitions challenging decisions of the Industrial Court (now Employment and Labour Relations Court)
2. Whether deduction of agency fees and service charge violate Article 40 and 41 of the Constitution.
3. Whether the Claimant is entitled to the declarations and orders sought in the Statement of Claim

Jurisdiction

The jurisdiction of this court vis-a-vis the High Court is set out in Article 162(2) and as read with Article 165(5) of the Constitution and Section 12 (1) of the Industrial Court Act, 2011 which provide as follows:-

Article 162: System of courts

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

Article 165: High Court

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

Section 12 (1) of ELRC Act: Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

In the ***USIU*** and ***Kenyatta University*** cases (supra), which have been cited by all the parties in this case the court stated that this Court as constituted by virtue of Article 162(2) of the Constitution and Section 12 of the Industrial Court Act (now the Employment and Labour Relations Act) has exclusive jurisdiction

to hear and determine all constitutional matters relating to employment and labour relations. This position was reiterated in the recent Court of Appeal decision in Prof. Daniel Mugendi v Kenyatta University & 3 others, Court of Appeal at Nairobi Civil Appeal No. 6 of 2012.

All the parties have in their submissions agreed that this is the position. We reiterate that this Court has exclusive jurisdiction to hear all disputes relating to labour and employment matters including this case.

Agency fees

In 2007 the Labour Relations Act was enacted. The commencement date of the Act is 26th October, 2007. The Act repealed the Trade Unions Act under which trade unions were previously registered and organised, and the Trade Disputes Act under which trade disputes were resolved. The Labour Relations Act introduced Agency fees under Section 49. The Section provides as follows:-

Deduction of agency fees from unionisable employees covered by collective agreements

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.

The Claimant avers that agency fees is unconstitutional and contravenes Article 40 and 41 of the Constitution by depriving the Claimant's members' the right to property and the right to fair labour practices.

Section 49 allows a union which has negotiated a CBA to charge agency fees on a non-member benefiting from the terms of the CBA.

Agency fee is not peculiar to Kenya. It is charged in most states in the United States of America and Europe. In the case of ***Abood v Detroit Board of Education 431, US 209 (1977)***, the constitutionality of agency fees was considered by the Michigan Court of Appeal. Briefly, the facts of the case are that a Michigan statute authorising union representation of local government employees permits an agency shop arrangement whereby every employee represented by a union, even though not a union member, must pay to the union, as a condition of employment, a service charge equal in amount to union dues.

The appellant teachers filed action against the Respondents (the State and the Union) challenging the validity of the agency-shop clause in a collective bargaining agreement between the Board and the Union. The complainant alleged that the appellants were unwilling or had refused to pay union dues that they opposed collective bargaining in the public sector, that the union was involved in various political and other ideological activities that the appellants did not approve and that were not collective bargaining activities. They prayed that the agency-shop clause be declared invalid under the State law and under the United States Constitution as a deprivation of the appellants' freedom of association. The Michigan Court of Appeals upheld the constitutionality of the agency-shop clause, and, although recognising that the expenditure of compulsory service charges to further "political purposes" unrelated to collective bargaining could violate the appellants' constitutional right, held that in so far as the service charges are used to finance expenditures by the Union for collective-bargaining, contract-administration, and grievance-adjustment purposes, the agency shop clause was valid. The court further held that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less than an infringement of their constitutional rights, that the Constitution requires that a Union's expenditure for ideological causes not germane to its duties as a collective-bargaining representative be financed from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of employment.

In the US Supreme Court decision in **Communication Workers of America v Beck 487 U.S. 735 (1988)** while interpreting section 8(a)(3) of National Labour Relations Act held that the section was intended to correct abuses of compulsory unionism that had developed under "closed shop" agreements and, at the same time, to require, through union security clauses, that non-member employees pay their share of the cost of benefits secured by the union through collective bargaining and cannot be read to prohibit the collection of fees in excess of those necessary to cover costs of collective bargaining. The court further held that Congress was guided by the principle that those enjoying the benefits of union representation should contribute their fair share to the expenses of securing those benefits.

Section 8(a)(3) of the National Labour Relations Act permits an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of continued employment, whether or not the employees become union members. The Petitioner, Communication Workers of America entered into a collective bargaining agreement that contained a union-security clause under which all represented employees who do not become union members must pay the union "agency fees" in amounts equal to the dues paid by union members. The Respondents, bargaining unit employees who chose not to become union members, filed suit challenging the petitioner's use of their agency fees for purposes other than collective bargaining, contract administration or grievance adjustments.

Again in **Chicago Teachers Union v Hudson 475 U.S. 292 (1986)** the US Supreme Court held that under an agency shop agreement, procedural safeguards are necessary to prevent compulsory subsidisation of ideological activity by non-union employees who object thereto while at the same time not restricting the union's ability to require any employee to contribute to the cost of collective bargaining activities.

These cases demonstrate that it is valid for a union to charge agency fees as a contribution to the cost of collective bargaining provided that such fees are not used to further political or other ideological activities that are unrelated to collective bargaining and representation of the workers.

Closer home, agency fee is permitted in the Republic of South Africa. The Labour Relations Act of the Republic of South Africa provides at section 25 as follows:-

25. Agency shop agreements

(1) A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.

(2) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed-

(a) by an employer in a workplace; or

(b) by the members of an employers' organisation in a sector and area in respect of which the agency shop agreement applies.

(3) An agency shop agreement is binding only if it provides that-

(a) employees who are not members of the representative trade union are not compelled to become members of that trade union;

(b) the agreed agency fee must be equivalent to, or less than-

(i) the amount of the subscription payable by the members of the representative trade union;

(ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; or

(iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee;

(c) the amount deducted must be paid into a separate account administered by the representative trade union; and

(d) no agency fee deducted may be-

(i) paid to a political party as an affiliation fee;

(ii) contributed in cash or kind to a political party or a person standing for election to any political office; or

(iii) used for any expenditure that does not advance or protect the socio-economic interests of employees.

(4) (a) Despite the provisions of any law or contract, an employer may deduct the agreed agency fee from the wages of an employee without the employee's authorisation.

(b) Despite subsection 3(c) a conscientious objector may request the employer to pay the amount deducted from that employee's wages into a fund administered by the Department of Labour.

(5) The provisions of sections 98 and 100(b) and (c) apply, read with the changes required by the context, to the separate account referred to in subsection (3)(c).

(6) Any person may inspect the auditor's report, in so far as it relates to an account referred to in subsection (3)(c), in the registrar's office.

(7) The registrar must provide a certified copy of, or extract from, any of the documents referred to in subsection (6) to any person who has paid the prescribed fees.

(8) An employer or employers' organisation that alleges that a trade union is no longer a representative trade union in terms of subsection (1) must give the trade union written notice of the allegation, and must allow the trade union 90 days from the date of the notice to establish that it is a representative trade union.

(9) If, within the 90-day period, the trade union fails to establish that it is a representative trade union, the employer must give the trade union and the employees covered by the agency shop agreement 30 days' notice of termination, after which the agreement will terminate.

(10) If an agency shop agreement is terminated, the provisions of subsection (3)(c) and (d) and (5) apply until the money in the separate account is spent.

The purpose of agency fees is to compel non-union members who benefits from the union's negotiated CBA to contribute to the cost of negotiating the CBA and to rid the union of free riders. An employee who is charged agency fee is not consulted on the same. He is required to pay as long as he is benefiting from the CBA negotiated by the union charging agency fees.

In the present case the Claimant argues that agency fees is unconstitutional on several grounds.

The first ground is that the Claimant's members being charged agency fees are already members of another union and are therefore not covered by Section 49. The second is that they are forced to associate with the 3rd Respondent in contravention of their right of association and thirdly, that agency fees deny the Claimant income and right of association as employees are forced to resign from its membership to avoid double deduction, that is, paying union dues for the Claimant and agency fees for the 3rd Respondent.

Section 49 of the Labour Relations Act expressly provides that agency fee is not union dues but is charged as a fee to non-members who are benefiting from a CBA negotiated by a union. Union dues on the other hand are provided for in Section 48 and are paid by union members for purposes representation. This difference is reflected in all payslips annexed to the Claimants memorandum under Annexure 31 and 32 which have two separate entries, one for union dues and the other for agency fees. The union dues are referred to as "**KHAWU**" while Agency fee is clearly reflected as either "**KUDHEIHA**" or "**KUDHEIHA agency fees**".

In determining this issue the court has to consider two opposing interests, that of the union to be cushioned against negotiating for free riders, and that of the employee who is compelled to pay agency fees to a union he is not a member of.

It is our opinion that it would not be fair for a union to negotiate for free riders. This would encourage members to withdraw from membership as they would still benefit from the CBA without being members or paying any fee for the union's efforts and expenses for negotiating the CBA. It is also a fact that an employer cannot pay different wages to employees who are union members and those who are not. This would amount to discrimination and is prohibited by both the Constitution and the Employment Act. We also do not think that agency fees constitutes interference with freedom of association as an employee paying agency fee to the union that negotiates the CBA is not prohibited from joining any other union of his/her choice.

The only catch is that if the employee chooses to join membership of a union that is not the one recognised for negotiation purposes he would pay a little extra in the form of agency fees, to benefit from the negotiated terms. There is nothing unconstitutional about that. A trade union is like a membership club. In clubs none members are always charged for services that members are entitled to without additional charges. In the present case, this is sanctioned by Section 49 of the Act. The Constitution does not provide that freedom of association should be free of charge. It would be unfair and

discriminatory for a union to charge members union dues for membership that is used to fund CBA negotiations but charge nothing to non-members who non the less also benefit from terms negotiated and funded by membership fees.

It is further our opinion that this was the intention of the legislature. Under the repealed Trade Unions Act, it was a condition for registration of a union under Section 16 that there is no other union claiming to represent employees in the sector in which the union sought registration. This condition was also provided for in cases of recognition where Section 5(2) of the Trade Disputes Act provided that a trade union would not be granted recognition if there was another union claiming to represent the same employees or sector.

The intention to have only one union in an organisation or sector is also reflected in recognition agreements including the Claimant's as reflected in the copies sent to members of the 2nd respondent to sign. (Refer to Claimant's Statement of Claim at Appendix"J.O. 5" at page 221 to 250). It provides at paragraph 2 (a) as follows:-

> *"The XXXX affords full recognition to the union as a properly constituted and representative body and* ***Sole labour organisation representing*** *the interests of workers who are in employment of XXX in all negotiable matters concerning rates of pay, overtime, hours of work..."* (Emphasis added)

Such intention is also reflected in the Labour Relations Act at Section 14 (1) (d) and Section 54(1), (2) and (3) which provide as follows:-

> 14.*(1). A trade union may apply for registration if—*
>
> a.
> b.
> c.
> d. *no other trade union already registered is—*
>
> *(i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration; or*
>
> *(ii) in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:*

Section 54

> 1. *An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.*
>
> 2. *A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.*

At the time when the Claimant started recruiting employees who were already benefiting from the CBA between the 2nd and 3rd Respondents it was aware about the provisions of the Trade Unions Act and later, about section 49 of the Labour Relations Act. The sections provide that for a union to be recognised for purposes of collective bargaining it needs to have in its membership only a simple majority and therefore

the union will be negotiating for terms that will also benefit non-members. Section 49 then provides for those non-members to pay agency fees. The Claimant must or should have anticipated that by going to recruit members in an entity which already had an existing trade union with a subsisting CBA, it would cause such members to become liable to pay agency fees. The Claimant would enjoy similar privileged position should the 3rd Respondent or any other union venture into its territory where it enjoys recognition and collective bargaining rights.

Section 48 and 49 are not mutually exclusive. One is for payment of union dues by members of a trade union and the other for payment of agency fees by non-members benefiting from a union CBA. The law does not suggest that the two cannot be charged at the same time. Article 41 does not suggest that freedom of association should be free of charge nor does it suggest that payment of agency fees is interference with freedom of association. Agency fees does not limit the right to freedom of association. It is a charge for a benefit. On the contrary, section 49 coming immediately after section 48 in the Act appears to have anticipated a situation where an employee can benefit from a CBA of one union and be a member of a different union. The Act therefore provided for union dues for the latter and agency fees for the former, thus ensuring that both unions are fairly and adequately catered for, while at the same time an employee is free to join a union of his choice and while benefiting from terms of a collective agreement negotiated by a union in which he does not wish to become a member.

We find that neither Article 40 nor 41 are infringed by Section 49 of the Act. It is our opinion that it is perfectly in order and there is nothing unconstitutional about a union charging a levy on non-members who benefit from its negotiated CBA.

Service Charge

Service charge is provided for in the CBA as follows:-

21. Service Charge

(i) The employer will operate a service charge on accommodation sales including accommodation sales arising from apartments and cottages serviced by the organization's employees and on food sales covering all food outlets (including coffee shops and food sales on outside catering functions and all beverages) whether by cash or credit. Provided that where organizations charge service charge on other revenue items e.g for bar sales, garden products sales, laundry, telex, sauna and telephone charges, handling charges and transport services, then such service charge shall be collected by the employer and distributed in accordance with the provisions detailed below.

ii) The money collected through service charge shall be distributed equally to all unionisable employees (always excepting management staff) on terms to be agreed by the Works Committee of an individual establishment. A monthly reconciliation as to the service charge collected and distributed shall be provided by the employer to the shop steward of an individual establishment or in the absence of a Shop Steward, the local Union representative at the time when the service charge is distributed.

Iii) The union in consultation with the association may appoint a qualified auditor to

audit the books and all records of accounts maintained by the employer on service charge. The appointed auditor must discuss the fee note with the employer to be audited. They shall agree on the fee note with the employer to be audited. The employer whose records are to be audited will advance up to half of the appointed auditor's fee as a direct payment to the audit. In the event that no malpractice is found, the full cost of the audit would be met by the union from the check-off. If malpractice is found, the employer shall meet the full cost.

iv) Once the periodical annual audit of the employer has been completed by its own auditors, the employer shall provide to the Shop Steward of the establishment or in the absence of a Shop Steward, the local union representative, an audited reconciliation of service charge collected and distributed covering the audit period.

v) A deduction equal to 0.5% of all service charge revenue so collected shall be paid to an account to be operated by two people from the Union and two from the Association side, to facilitate operation of both bodies and the member's education as per annual budget. The balance shall be disbursed as below:

A deduction of 10% will be retained by the employer from service charge collection for administrative purposes. The balance of 90% being distributed as per sub-clause (ii) above.

vi) The minimum service charge percentage to be levied by employers will be 6% on sales as detailed in sub-clause (i) until 30th June 2011 and from 1st July 2011 it shall be 7%.

vii) A 5.5% service charge on beverages will be levied.

viii) Service charge will continue to be charged on game drives and shuttle buses at the rate of 1% where the services are charged for.

No employer will reduce the service charge levied below that which is existing in an establishment at this commencement of this Agreement.

The Claimant's quarrel with service charge is that 0.5% is withheld by the 2nd and 3rd Respondents and it is banked into an undesignated account in violation of section 50(1) of the Act and the money is then used to train managers of the 2nd Respondent who are not members of the Claimant. The Claimant submits that this contravenes Section 39 of the Act which requires any levy to be deposited into a designated account. The Claimant submitted that the 2nd Respondent is supposed to deduct 10% but what reaches the employee is 85% and not 90%. The Claimant has referred to its appendix "J.O. 10" which is an email communication to members of the 2nd Respondent. Paragraph 4 thereof states as follows:-

"*These will cover all member hotels union officials starting with the Shopstewards, Shop Chairmen and Secretaries where they shall be trained on all the Labour Law, the Industrial Relations Charter and general Industrial harmony. The same training will be undertaken for member hotels HR Practitioners i.e. HR Directors, Managers and officers. There may be need to extend this training to General Managers and CEO's at a different forum so that they may also get informed as decision makers. The JIC already has a tentative timetable for this as we would be to roll out the training immediately. This will help alleviate the levels of "ignorance" at both shop and management levels. Please note that the term "ignorance" is in quotes and should not be taken literally but to mean that either side interprets the laws differently to a certain extent hence the need to eliminate this through training."*

There are two misconceptions in the Claimant's arguments; one is that service charge is union dues and the other, that only managers benefit from training through the 0.5% deduction from service charge that is retained for training purposes. The paragraph clearly states that the fund is used for seminars for shop-stewards, shop chairmen and secretaries. They are union officials.

The issue of service charge was succinctly addressed by **Kosgei J** (as he then was) in ***Cause No. 90 of***

2006 KHAWU v AG & OTHERS in which he stated as follows:-

> ***"Turning to the question of service charge, it is clear that Section 21 of the said Collective Bargaining Agreement mandates the 1st Respondent to impose service charge on its customers. The amount collected through this charge is distributed to the unionisable employees on pari passu basis on terms to be agreed upon by the works committee of individual establishments. This charge was introduced through collective bargaining by the parties to the collective bargaining agreement. It is not a product of statutory intervention. Consequently, the parties are at liberty to extend the frontiers of its operations as they wish so long as the final produce is beneficial to the parties. In the recent Collective Bargaining Agreement registered as RCA 142 of 2010 the parties amended the service charge clause by introducing a charge of 0.5% on all collections to be paid into an account to be operated by the union and the employers for purposes of education of the employees. This is the issue complained about by the Claimant. The complaint is untenable firstly because the Claimant has no locus standi to question an agreement that it is not a party to. Secondly, we find nothing wrong with the amendment to the service charge clause. The manner of distribution of the service charge is a matter of mutual agreement between the parties in the collective bargaining agreement. The addition of employees' education to distribution process is acceptable and noble as it is for benefit of the employees. The safeguard of operation of the education account by the union and the employers will deter abuse of the account. In the circumstances we will not interfere with the running of the service charge account in this regard."***

We agree with the sentiments of the Judge and adopt the same in entirety. We reiterate that service charge is a term in the CBA negotiated by the 2nd and 3rd Respondents and the Claimant has no *locus standi* to challenge the service charge clause in an agreement that it is not party to. This prayer must therefore fail.

Remedies

The Claimant prayed for two sets of remedies. The first set are declaratory orders while the second set are what the Claimant refers to as orders. We will address them in the order in which they are pleaded.

Declaration that the Claimant's members' rights to fair labour practices enshrined in Article 41 (1) and right to private property enshrined in Article 40 of the Constitution

We do not find any infringement of Article 41 (1) of the Constitution. We also do not find agency fee to constitute deprivation of the Claimant's members' right to private property enshrined in Article 40 of the Constitution. We thus find no merit in these prayers and dismiss them

Declaration that the High Court has no jurisdiction to hear and determine the following;-

i) JR MISC APPLICATION NO. 430 OF 2009

ii) MISC APPL. NO. 138 OF 2009

iii) JR. MISC. APPLICATION NO. 235 OF 2005

iv) JR MISC. APPL. NO. 1349 OF 2005

v) PETITION NO. 384 OF 2009

vi) PETITION NO. 405 OF 2009

vii) MISC. APPLICATION NO. 144 OF 2010 (MOMBASA)

viii) HICC NO. 467 OF 2009 together with cases consolidated therein.

All these matters were filed between 2005 and 2010 before this court as currently constituted under Kenya Constitution 2010 came into existence. At that time no appeals were allowed from decisions of the Industrial Court pursuant to section 17 of the Trade Disputes Act. The only way of challenging the court's decisions was through either a judicial review application or a constitutional petition to the High Court. This has now changed and the High Court is no longer clothed with jurisdiction to hear the cases. However, none of the files have been brought before us. We cannot make orders on files which are not before us.

Even if we had the files with us, we would not have jurisdiction to make such orders in respect of matters currently before the High Court as the jurisdiction of this court is of the same status as the High Court. What the Claimant is asking us to do is to exercise supervisory powers over the High Court by ordering withdrawal of the files from the High Court and transferring them to this court for hearing and determination. These are powers that we do not have. Making such orders would violate Article 165 (6) and (7) which provide as follows:-

> *(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*
>
> *(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

We also take note of the provisions of Section 22 of the Transitional and Consequential Provisions under the 6th Schedule of the Constitution which provides for judicial proceedings and pending matters as follows;

> "*All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court"*..

The correct procedure is to seek transfer of these cases in the respective files.

2. Orders

a) An order revoking Gazette Notice No. 2911 of 27th March, 2009.

b) An order directed at the first, second and third Respondents to refund to the Claimant's members all sums so far deducted from them under the guise of "agency fee" and service charge

c) An order directed to the Registrar of Trade Unions to strike out the words "hotels restaurants, casinos, catering and similar establishments providing lodgings, food, beverages and further categories of related establishments providing tourism services, clubs, guest houses, camping sites and golf clubs" from the Constitution of the third Respondent.

d) An order compelling the second respondent to sign a Recognition Agreement and negotiate a Collective Bargaining Agreement with the Claimant.

e) An order setting aside Industrial Court collective Bargaining Agreement No. 142 of 2010.

These prayers were pursued in several cases in this Court and were declined with reasons. In his ruling in Cause No. 182 of 2008 between the Claimant and the 2nd Respondent and 163 (N) of 2009 between the Claimant and the 3rd Respondent **Madzayo J** (as he then was) declined to grant similar orders and had this to say in respect thereof:-

"That the employees are not ready to revert to their old salaries which they used to earn two years ago before the Second Respondent signed the new Collective Bargaining Agreement. Secondly, in the court's opinion, the Minister for Labour did not commit any wrong in law in ordering for the Agency Fees to be paid to the Second Respondent. The Minister for Labour is empowered to order payment of Agency Fees in accordance and in exercise of powers conferred upon him by Section 49 of the Labour Relations Act. The Legislature in its wisdom vested those powers upon the Minister for Labour. Unless the same Legislature repeals that law; in the court's opinion it is still in force and there is no illegality in executing that authority."

For the same reasons we would decline to grant orders revoking the Gazette Notice. We however note that the particular Gazette Notice was revoked and replaced by Gazette Notice No. 17449 of 28th November, 2012. The Claimant did not make any application to amend the prayer. Even if the amendment was made, the same reasons would apply.

Having declined to revoke Gazette Notice No. 2911 of 27th March 2009, it follows that the prayers to refund agency fees paid pursuant to the said Gazette Notice would also fail and we hereby dismiss the same.

The prayer to order the Registrar of Trade Unions to strike out the words "*hotels, restaurants, casinos, camp sites, catering and similar establishments providing lodging, food, beverages or both and further categories of related establishments providing tourism services*" from the Constitution of the 3rd Respondent would in our view infringe on the freedom of association of the 2nd Respondent and the employers who are its members as well as the freedom of association of all the employees who are the 3rd Respondent's members within the sector who are not the Claimant's members. Having joined a crowded field by seeking registration in an arena where there was already another player, the Claimant must be prepared for the competition and to fight for its share of members. It cannot use an order of this court to get members where it has been unable to recruit over the years. Should it achieve a simple majority among either all the employees in the sector or within any specific hotel it may seek recognition in accordance with the law.

The prayer seeking stay of CBA registered as No. RCA 142 of 2010 has been overtaken by events as the employees are already enjoying the benefits of that CBA and it is already part and parcel of their terms and conditions of service. In any event such an order would be prejudicial to the employees as they would be left without a CBA yet the Claimant has not yet been recognised to negotiate with the 2nd Respondent.

For the Claimant to qualify for recognition by the 2nd Respondent, it must prove that it has achieved a simple majority of either 50% of the 2nd Respondent's member organisations or of the employees of the 2nd Respondent's members. The court cannot hand the Claimant recognition without it proving that it has achieved a simple majority as this would contravene both Article 41 of the Constitution and Section 54 of the Act.

For these reasons the claim herein is dismissed. Each party shall bear its costs.

THE DISSENTING JUDGMENT OF NDOLO J

I adopt the background and facts of this case as set out in the majority decision. I also associate myself with the foregoing findings and determination on all other issues save for deduction of agency fees from the Claimant's members on which I render this dissenting opinion.

The Claimant states that levying of agency fees on its members is an affront to their right to belong to a trade union of their choice and that it amounts to a deprivation of their property.

As stated in the majority opinion, agency fees is allowable by law. Specifically, Section 49(1) the Labour Relations Act provides 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.

There is no argument that a trade union that has negotiated a collective bargaining agreement from which unionisable employees reap benefits is entitled to some consideration for its trouble. From its members, the trade union earns union dues and from non members who nevertheless enjoy the fruits of the CBA, the trade union is entitled to agency fees.

The point of departure has to do with the applicability of agency fees on employees who are members of a rival union. The Court was referred to Article 41(2) of the Constitution which guarantees the right of every employee to subscribe to a trade union of their choice.

In my view, this right would be constricted by an interpretation of Section 49(1) of the Labour Relations Act that gives a *carte blanche* for levying of agency fees on all unionisable employees covered by a CBA irrespective of the wishes of those employees to belong to an alternative trade union. This is more so because the capacity to negotiate a CBA which is grounded on the existence of a recognition agreement is based on the number of unionisable employees a trade union recruits.

Moreover, the constitutionality of the decision in ***Abood v Detroit Board of Education*** (supra) has been questioned in the more recent case of ***Harris v Quinn 134 S. Ct 2618 (2014)*** where it was held that forcing non-governmental workers to pay agency fees to a union that represents government workers just because they received a governmental benefit in the form of medical assistance was unlawful. The Court went on to state that freedom of association presupposes freedom not to associate.

I have had occasion to address the issue of levying agency fees on non union members in ***Rift Valley Railways Workers Union v Rift Valley Railways (Kenya) Limited & Another [2014] eKLR*** where I held that the rationale behind Section 49(1) of the Labour Relations Act is that an employee who is not a member of a trade union but nevertheless enjoys the benefits of a CBA negotiated by a trade union should be made to pay for the services rendered by the trade union. I further held that this provision does not apply in cases where an employee belongs to a rival trade union in the same sector. I find no reason to change my position on this matter.

At any rate, even assuming that the "agency shop arrangement" under which non union members are required to pay for services rendered by the union is lawful, courts have consistently sought to demarcate costs related to collective bargaining from costs related to other union activities. In ***Chicago Teachers Union v Hudson*** (supra) it was held that non union members should not be required to fund ideological and political projects of a union unless they choose to do so.

In similar fashion, the US Supreme Court ***in Knox v Service Employees International Union U.S. 310 (2012)*** rendered itself as follows:

"...When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree…creating a risk that the fees nonmembers pay will be used to further political and ideological ends with which they do not agree....."

In the Kenyan context, agency fees has traditionally been pegged at the same level as union dues meaning that in terms of expense to the employee, there is no difference between a member and a non member. More significantly, there is no telling which union activities are funded by agency fees collected from non members.

Indeed, nothing bars a trade union from applying funds collected from non members in the form of

agency fees towards advancing political and ideological agendas to which the non members do not subscribe. It seems to me therefore that the application of agency fees as currently effected amounts to levying of compulsory union dues aimed at discouraging employees from joining any other union apart from that which is recognised by the employer for purposes of collective bargaining.

I think this is an unfair labour practice on two scores. First, it interferes with the employee's right to subscribe to a trade union of their choice by making it financially expensive to join a rival union where there exists a recognised union. Second, it kills competition and entrenches monopoly by a single trade union even in the face of multiple registration of trade unions in a particular sector because an employee on whom agency fees is imposed is most likely to opt out of union membership in order to avoid paying double charges. To my mind, this amounts to taking away a fundamental right granted under Article 41(2) of the Constitution as well as under Section 4(1) of the Labour Relations Act. The strength of trade unions should lie on voluntary membership and not compulsory charges from non members.

For the foregoing reasons and with tremendous respect to my brother and sister Judges on this Bench, I dissent on the issue of deduction of agency fees from the Claimant's members.

DATED SIGNED AND DELIVERED IN OPEN COURT NAIROBI THIS 6TH DAY OF NOVEMBER, 2015

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE

MAUREEN ONYANGO

JUDGE

LINNET NDOLO

JUDGE

In the Presence of

Mr Wati for the Petitioner

Mr Ongoto for the 3rd Respondent.