



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 11 of 2012

**KENYA PLANTATION AND AGRICULTURAL WORKERS
UNION.....CLAIMANT**

V

**EXPRESSIONS FLORA
LIMITED.....RESPONDENT.**

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2013)

JUDGMENT

The claimant Kenya Plantation and Agricultural Workers Union filed the memorandum of claim on 02.02.2011. The claimant prayed for orders that:

- a) the respondent be ordered to comply with the mandatory provisions of sections 48 and 50 of the Labour Relations Act, 2007 Laws of Kenya by way of deducting union dues and remitting the same to the claimant;
- b) the respondent be compelled to implement the collective bargaining agreement with immediate effect;
- c) the cost of the suit be met by the respondent; and
- d) the court grants any other relief that it may deem fit for the ends of justice.

The respondent filed the defence to memorandum of claim on 25.07.2011 through Oraro and Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The case came up for hearing on 13.03.2013 and 8.05.2013. The claimant relied on the documents on record. The respondent called one witness, Beatrice K. Bokea, the respondent's human resource officer. Her testimony was as follows:

- a) She had worked for the respondent for five years since 2008.
- b) The claim before the court was that the respondent had refused to remit to the claimant union dues. However she did not know the number of employees in the respondent's service that were members of the claimant. She came to know about the dispute when the summons and pleadings in this case were served upon the respondent.

c) She referred to the letter dated 8.11.2011 being appendix EFL1 on the memorandum of claim about deduction of union dues. The letter referred to section 48 of the Labour Relations Act, 2007 and an attached bundle comprising of 20 copies of form S set out in a schedule signed by 457 employees. The letter requested the respondent to effect deduction of union dues as per the said bundle of completed forms and to remit to the specified account with effect from 30.11.2010.

d) She had seen the list of names said to be employees of the respondent attached to the memorandum of claim and she could not recognize all the names as belonging to the respondent's staff. According to her records only 51 were employees, 68 were not the respondent's employees, 3 were employees in the management and two names were repeated twice. The summary is appendix B on the defence to the memorandum. She informed the 51 employees that she was going to deduct the union dues and they reacted by writing the letters marked appendix C on the response rejecting the deduction as they had not consented to the deduction or membership to the union. The letters were addressed to the claimant through the respondent. The letters are variously dated 9th or 10th or 11th February 2011 because the case had been filed in court. The letters are 102 and the respondent did not forward them to the claimant. In view of the letters, the respondent could not deduct the union dues. She did not receive the forms signed by the 51 employees to deduct the union dues. The 51 employees have since reduced. For those who did not write to object, the deductions were not made because the matter was in court and union deductions and remittance would be made if the court directed the same.

e) She confirmed that the respondent was a member of the Agricultural Employers Association from May 2009. Appendix EFL2 being letter dated 8.12.2010 and paragraph 6 of the memorandum of claim confirmed the respondent's membership in the association.

The claimant filed written submissions on 26.03.2013 and the respondent's submissions were filed on 12.04.2013. Oral submissions were made on 8.05.2013. In view of the submissions, the respondent has no dispute on the following issues:

a) The respondent is not opposed to deduction and remittance of union dues.

b) The respondent is a member of the Agricultural Employers Association and is bound by the recognition and collective agreement concluded between the claimant and the Association.

The main issues in dispute to be determined in this case are:

1. Whether the claimant has complied with the statutory provisions so as to enable the respondent to effect deduction and remit the union dues.

2. Whether deduction and remittance of agency fees under section 49 of the Labour Relations Act, 2007 violates the negative right not to join a trade union under Article 41(2) (c) of the Constitution.

3. Whether the claimant is entitled to the remedies prayed for in the memorandum of claim.

The claimant has prayed that the respondent be ordered to comply with the mandatory provisions of sections 48 and 50 of the Labour Relations Act, 2007 Laws of Kenya by way of deducting union dues and remitting the same to the claimant. The cited section 48 states:

“48. (1) In this Part, “trade union dues” means a regular subscription required to be paid to a trade union by a member of the trade union as a condition of membership.

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five

employees belonging to the union to—

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted –

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

(4) The Minister may vary an order issued under this section on application by the trade union.

(5) An order issued under this section, including an order to vary, revoke or suspend an order, takes effect from the month following the month in which the notice is served on the employer.

(6) An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.

(7) A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.

(8) An employer shall forward a copy of any notice of resignation he receives to the trade union."

It was submitted for the respondent that there must be a Ministerial Order made under the section directed at the employer and instructing the employer to deduct trade union dues from the wages of its staff being members of the union. The monies, it was submitted, should be deducted and paid into a specified account of the trade union or specified accounts of a trade union and a federation of trade unions. Further, the union must serve the employer with a notice in Form S signed by the employees in respect of whom the employer is required to make a deduction. The employer, it was submitted, must ensure that the employee has not resigned from the union. The respondent submitted that the requirements had not been met. The letter of 8.11.2010 forwarding the Ministerial Order did not contain the Order. Such omission went to the root of the respondent's power to deduct and remit the union dues and affected the legitimacy, transparency and accountability of the claimant's demand for union dues.

The claimant submitted that the basic membership subscriptions were provided under the claimant's constitution as per exhibit E1 on the memorandum of claim. The claimant's case was that there was compliance with section 48 of the Act because:

a) the respondent's employees had not validly withdrew membership from the claimant since they had re-

signed check-off forms dated 25.07.2011 as filed in court on 3.05.2012 as supplementary list of documents. The February 2011 purported disowning of membership was therefore invalid especially that the letters were never delivered to the claimant and the employees re-signed the forms as submitted.

b) The check-off forms were signed by the employees who are members of the claimant and delivered to the respondent. The refusal to remit the union dues undermined the collective bargaining agreement driven by the trade union.

The court has considered the submissions made and finds that a Ministerial Order under the section is made at the instance of the trade union moving the Minister to make such an order. In this case, it is clear from the forms signed by the employees marked efl5 on the claimant's submissions and EFL1 on the memorandum of claim that the deductions were in pursuance of Ministerial Orders made by the Minister under section 48 of the Act ending with the one which took effect from 26th October 2007. The forms set out all the details on the deductions and the details of accounts as required under section 48.

Where the trade union has concluded a recognition and collective agreement with an organization of employers, the court holds that a Ministerial Order directed at the employers' organization to deduct is sufficient for purposes of deductions by any employer being a member of the organization. The court also finds that as provided under the section the respondent cannot make deductions and remittances with respect to employees who have resigned from the union. However, such deductions and remittances can only cease effect if the employer has notified the union about such resignations.

In this case, the court finds that there were no valid resignations as the purported resignation letters were never served upon the claimant and the concerned employees subsequently signed to indicate union membership and to give authority for the deductions to be effected. Further, the court considers that statutory provisions on cessation of deduction would apply where the employee being a union member, the deductions and remittances by the employer have been implemented and it is desired to stop them in view of the employee's resignation from the union. In this case, the deductions and the remittances had not commenced and the court finds that the respondent cannot rely on the statutory provisions on cessation of deductions to justify failure to deduct and remit the trade union dues. In the opinion of the court, cessation cannot be invoked for the deduction which had not commenced and being ongoing.

As provided in section 48 (3) of the Act, it is the service upon the employer of the notice in Form S that triggers the deduction of trade union dues. There is no statutory requirement for the union to serve the Ministerial Order. However, where parties may be in doubt as to existence of the Order, the court's opinion is that it is open and prudent for the union to show that the Order was issued by the Minister. The court finds that it was not a statutory requirement for the respondent to seek the employees' concurrence in the deductions once the prescribed notice had been served by the claimant. Thus, the court holds that once the prescribed statutory notice was served, the respondent was obliged to effect the deductions and to remit the same until or unless any of the concerned employees resigned from the union and the claimant notified by the respondent accordingly.

The claimant has also prayed for court's intervention in terms of section 50 of the Act. The section makes general provisions on deductions including issues of accountability and acknowledgement of the dues by the union and general administrative issues. The respondent did not raise any objections on the section and the court finds that if deductions are to be effected, both parties in this case will have to comply with the provisions of the section.

The claimant prayed that the court grants any other relief that it may deem fit to serve the ends of justice in the case. In the submissions, the claimant stated that where an employee resigns from the union, such an employee becomes immediately liable to pay urgency fee under section 49 of the Act. The section provides:

“49.(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 sub-section (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 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 cited Gazette Notice No. 13212 of 26.10.2010 being the Ministerial Order under the section as entitling it to require the respondent to deduct and remit the agency fees as provided in the section. The respondent opposed the claim and submitted that the case was about deduction of union dues under section 48 of the Act. The court has considered the submissions and is of the opinion that the framework of urgency fees and union dues is carefully designed to promote and protect trade union machinery in collective bargaining and to foster the employees' membership in the union. In **Banking Insurance & Finance Union (Kenya) – Versus- Kipsigis Teachers SACCO Society Limited, Cause No. 9 of 2012 at Nakuru**, the court stated:

“...It is therefore the court's considered opinion that the court may make one or other just remedy within its jurisdiction in view of the relevant and material evidence before it and provided that the making of such remedy would not be out of way as to come by surprise to the parties before the court. Further, it is the court's opinion that a remedy could be made if such remedy is the natural or obvious likely alternative to the one expressly pleaded or, is the natural or obvious likely remedy to the injury pleaded and established as having occurred in the proceedings before the court. The court considers that to be the exception to the general rule that a litigant must expressly plead the remedy sought and courts shall not grant a remedy unless it is expressly pleaded.

Thus, failure to remedy the injury in such cases, in the opinion of the court, would be unnecessarily and unjustly glorifying technicalities at the expense of just, expeditious and proportionate resolution of the dispute. Finally, in taking such opinion, the court is guided that under Article 159 of the Constitution, the principles for the exercise of judicial authority include, that justice shall not be delayed and justice shall be administered without undue regard to procedural technicalities. In

appropriate cases like the present one, the court finds that making a remedy one way or the other will meet the ends of justice without insisting that the litigant should have expressly pleaded the remedy....”

The court upholds that opinion and in view of the mischief cured by statutory provision for agency fees and the material before the court, the court finds that it would be just to make an order for urgency fees as submitted for by the claimant. The order would not go out of way as to take the respondent by surprise and it would not go outside restating the statutory provision that binds the parties in this case on the issue of agency fees.

The court has considered the policy considerations of the role of the trade unions in collective bargaining in the case of **Peter Wambugu Kariuki and 16 Others –Versus- Kenya Agricultural Research Institute, Petition No. 20 of 2013** where it was stated in the judgment, thus:

“Thirdly, it is vital to appreciate the antagonistic challenges this court and other relevant institutions are likely to face towards the realization of the right to fair labour practices. These challenges manifest as difficult policy considerations that inform decision making in determining disputes relating to fairness in employment and labour relations and prescribing appropriate remedies. In that regard, two dilemmas have emerged for which it is not easy to envision the evolution of employment and labour relations and the role of the law in that evolution. The dilemmas have been expressed in the following terms:

‘...These are first whether to promote collective labour relations founded on effective bargaining which can only be based on strong trade unions, or whether to encourage the progressive dilution of ‘bargaining’ in favour of the more ambiguous ‘information and consultation standards’....The second dilemma is to determine the extent to which it is legitimate to qualify management prerogatives, which some employers would like to exercise subject to little or no restriction, by individual employment rights.’[\[1\]](#)

In our constitutional and statutory framework on employment and labour relations, a mixed prescription with regard to the identified dilemmas has been provided for and it is the opinion of the court that in resolving disputes about the right to fair labour practices, every individual case shall be considered and determined on its unique merits. Admittedly, these dilemmas have continued to confront this court in the many cases that come before the court and hopefully a coherent approach based on the nature of the cases presented will evolve or emerge.”

The court considers that the provisions of sections 48 and 49 of the Act are examples of statutory provisions that promote collective labour relations founded on effective bargaining which can only be based on strong trade unions. Accordingly, the statutory provisions for both trade union dues and the agency fees are aimed at concentrating labour relations based on strong unions and collective bargaining as opposed to the more ambiguous ‘information and consultation standards’. The statutory framework favours the policy position that for employees who properly qualify to be members of a trade union, their rightful strategy to secure their employment rights and obligations is best secured within the trade union’s machinery for collective bargaining. The machinery and the regime ensure that the employer shall not unilaterally vary the collectively agreed terms and conditions of employment. Further, the dual regime of trade union dues and the agency fees ensures that the employees who are legitimately expected to collectively bargain through the trade union are not victimized or harassed for supporting the machinery of collective bargaining.

Counsel for the respondent spent considerable time discussing what in the opinion of the court are the positive right of the employee to join a trade union and the negative right not to join a trade union under Article 41(2) (c) of the Constitution which provides that every worker has the right to form, join or participate in the activities and programmes of a trade union. Counsel for the respondent submitted that the provision conferred a freedom an employee can choose to exercise or choose not to exercise. It was

submitted that where an employee is not a union member or decides to exercise the freedom not to join the union or to form a union, the union would not be entitled to the union dues deductible from such an employee.

The court has considered the submissions and holds that the right to form, join and participate in the activities and programmes of a trade union is both a positive and negative right. The freedom to join a trade union entails the freedom not to join the union. However, such positive and negative right has to be assessed in terms of its social and economic effects based on the circumstances of every case. In the instant case, the trade union within the framework of recognition and collective bargaining agreements exists to assure reasonable working conditions for the employees within the category the trade union is registered to represent. If an employee in that category benefits from the trade union's collective bargaining agreements to enjoy better working conditions, the court's considered opinion is that the statutory regime requiring such an employee to contribute to the union by way of the statutory agency fees in view of the benefits (and only to contribute and not to join or participate in union activities) does not by itself or in effect undermine the employee's negative right not to form or join or participate in union activities.

It is the view of the court that the regime under sections 48 and 49 of the Act on union dues and agency fees is carefully designed to bind the employer and the trade union within their agreed recognition and collective agreements aimed at their mutual role and interest towards achieving stable and cordial industrial relations. Thus, as long as the trade union and the employer have complied with the statutory administrative and accountability provisions on deduction and remittance of trade union dues and the agency fees, it is the holding of the court that there is no violation of the negative right of the affected employee not to form, join or participate in trade union activities. In that sense, the view of the court is that whereas both positive and negative elements of the right exist and both form a base for valid claims in appropriate cases, in assessing the conflict of the two elements like in this case, the positive element stands on a higher ground than the negative element.

The respondent urged the court to make directions towards amicable settlement of the dispute. In the submissions, both parties agreed to bear their respective costs.

In conclusion, the court has considered the olive branch the parties extended to each other during the submissions and within that positive attitude, the court makes judgment and orders:

- a) the respondent shall make deduction of union dues and remit to the claimant as per the Forms S completed by the employees who are members of the claimant and employees of the respondent;
- b) the respondent shall deduct agency fees and remit to the claimant in accordance with section 49 of the Labour Relations Act, 2007;
- c) the parties shall meet within 14 days from the date of this judgment to reconcile the particulars of the respondent's employees subject to orders (a) and (b) above and the claimant shall file and serve the reconciled lists by close of 31.05.2013;
- d) the claimant shall, only for information reasons, by 31.05.2013, file and serve upon the respondent the Ministerial Orders referred to in the forms signed by its members requiring the respondent to deduct the trade union dues;
- e) the deduction and remittance of trade union dues and the agency fees in this matter shall commence at the end of June, 2013; and
- f) each party to bear own costs of this case.

Signed, dated and delivered in court at Nakuru this Friday, 17th May, 2013.

BYRAM ONGAYA

JUDGE

[1] See Richard Painter & Ann Holmes, Cases and Materials on Employment Law, Oxford University Press, (2002) 4th Edition at page 9.