

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. E.058 OF 2023**

*(Before Hon. Lady Justice Hellen Wasilwa)*

**FORUM FOR GOOD GOVERNANCE  
AND HUMAN RIGHTS.....PETITIONER**

**VS**

**PUBLIC SERVICE COMMISSION .....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY LABOUR  
AND SOCIAL PROTECTION.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, PUBLIC  
SERVICE YOUTH AND GENDER  
AFFAIRS.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**THE UNION OF KENYA  
CIVIL SERVANTS.....5<sup>TH</sup> REPENDENT**

**AND**

**CENTRAL ORGANIZATION OF  
TRADE UNIONS (COTU-K).....1<sup>ST</sup> INTERESTED PARTY**

**FEDERATION OF  
KENYA EMPLOYERS (FKE).....2<sup>ND</sup> INTERESTED PARTY**

# THE REGISTRAR OF

# TRADE UNIONS.....3<sup>RD</sup> INTERESTED PARTY

## JUDGEMENT

- 1 The Petitioner instituted this suit by a petition dated 17<sup>th</sup> March 2023. The Petitioner, Forum for Good Governance and Human Rights, is a non-governmental organization registered in Kenya to advocate for matters of good governance, labour practices, and fair employment policies under the Constitution of Kenya, 2010. The Petitioner is concerned about the application of section 49 of the Labour Relations Act and the implications of the Respondent's actions under Kenya Gazette Legal Notice No. 19 of 26<sup>th</sup> January 2022, published on 6<sup>th</sup> February 2022. These concerns, according to the Petitioner, jeopardize good governance, human rights, and fair labour practices within the public service.
  
- 2 The 1<sup>st</sup> Respondent, the Public Service Commission, is a constitutional body established under Article 233 of the Constitution, with functions derived from Article 234. These include establishing and abolishing offices in the public service, appointing individuals to those offices, exercising

disciplinary control, and promoting values and principles of public service as outlined in Articles 10 and 232. The 2<sup>nd</sup> Respondent is the Cabinet Secretary for Labour and Social Protection, tasked with overseeing labour matters and representing the government in industrial relations under the Industrial Relations Charter. The 3<sup>rd</sup> Respondent is the Cabinet Secretary for Public Service, Youth, and Gender Affairs, responsible for implementing policies related to salaries and benefits for civil servants. The 4<sup>th</sup> Respondent is the Attorney General, who provides legal advice to the government. The 5<sup>th</sup> Respondent is the Union of Kenya Civil Servants, a trade union registered under the Labour Relations Act, 2007.

- 3 The 1<sup>st</sup> Interested Party is the Central Organization of Trade Unions, a platform for trade unions and a partner in the social tripartite cooperation. The 2<sup>nd</sup> Interested Party is the Federation of Kenya Employers, representing employers in matters of socio-economic development and labour relations. The 3<sup>rd</sup> Interested Party is the Registrar of Trade Unions, a statutory office established under the Labour Institutions Act

and the Labour Relations Act, 2007, to oversee the registration and regulation of trade unions.

- 4 The Petition raises several critical issues. First, it challenges the exercise of statutory and quasi-judicial functions by civil servants and government officers under the Labour Institutions Act, 2007, and the Occupational Safety and Health Act, particularly concerning maintaining impartiality, accountability, and good governance. Second, it addresses the constitutional and statutory powers of trade unions to represent employees, particularly questioning the extent to which minority trade unions can exercise representational power. Third, it challenges the constitutionality of section 49 of the Labour Relations Act, 2007, arguing that its application violates the rights and freedoms of non-union members and that it remains unconstitutional until regulations under section 83 of the Act are formulated.
- 5 The Petition asserts that the historical purpose of trade unions, dating back to the 18<sup>th</sup> century, was to regulate employers and create economic balance between labour and capital. The failure of trade unions to operate optimally,

according to the Petitioner, risks industrial disharmony. The Petitioner relies on Articles 19 and 20 of the Constitution, which obligate the State to facilitate the enjoyment of the Bill of Rights under Chapter 4, including Articles 41 and 43, which pertain to labour and economic rights. It further notes that the State, through the 2<sup>nd</sup> Respondent, is mandated to facilitate these rights and obligations through legislative frameworks such as the Labour Institutions Act, 2007, and the Occupational Safety and Health Act, 2007, which create statutory offices and functions to advance these rights.

- 6 The Petitioner cites The Employment Act, 2007, which outlines various statutory powers and responsibilities, including obligations on employers to report dismissals and deaths of employees to labour officers (Sections 18(4)(b) and 24(1)), provisions for employees to lodge complaints on summary dismissals or unfair terminations, and the authority of labour officers to recommend remedies such as reinstatement, compensation, or re-engagement (Sections 47 and 49). The Act also addresses child labour complaints (Section 54). The Labour Relations Act, 2007, empowers the Minister to appoint conciliators for trade disputes (Sections

65-72) and permits the establishment of inquiry committees and delegation of powers. The Labour Institutions Act, 2007, establishes the Registrar of Trade Unions (RTU) to oversee the registration, regulation, and administration of trade unions, with strict guidelines for recruitment, naming, and the issuance or withdrawal of certificates under specified conditions (Sections 12, 14, 18, 19, 20, and others).

- 7 Further a trade union may apply for registration under the outlined conditions, including adopting a compliant constitution, maintaining a Kenyan office, and ensuring no other registered union sufficiently represents the same interests. Applications must include the prescribed fee, constitution, and meeting minutes, signed by seven members. The Registrar may request additional information, require name alterations, or reject applications if requirements are unmet, providing reasons for refusal. Registration includes issuing a certificate and entering details in the register. Grounds for cancellation or suspension include dissolution, fraud, unlawful operations, or failure to conduct elections, subject to notice and representation. Officials must render accurate accounts, verified by auditors, and provide annual

financial statements to the Registrar, including receipts, expenditures, and assets. Members may access these statements upon request. Non-compliance with any provision, including obstruction of inspections, falsification of records, or misuse of funds, constitutes an offence, and disputes may be referred to the Industrial Court, which may grant injunctions or order restitution of misappropriated property.

- 8 The Petitioner challenges the imposition of agency fees on non-members of the 5<sup>th</sup> Respondent, arguing that it violates constitutional rights and statutory provisions. The Directorate of Occupational Safety and Health Services (DOSHS) is highlighted as a critical institution mandated to implement the Occupational Safety and Health Act, 2007, and the Work Injury Benefits Act. DOSHS officers conduct workplace inspections, audits, accident investigations, and other statutory functions requiring independence and impartiality. The Petitioner underscores that such impartiality is compromised when officers are compelled to join or contribute to trade unions, either as members or through agency fees under Sections 48 and 49 of the Labour Relations Act.

- 9 The Industrial Relations Charter of 1964, which established tripartite cooperation among government, employers, and employees, forms the historical foundation for current labour and employment statutes. The Petitioner contends that officers in job groups below "P" in the civil service, who perform statutory duties under the Ministry of Labour, are being coerced into contributing agency fees despite their voluntary choice to abstain from union membership to maintain impartiality.
- 10 The Petitioner further asserts that the Legal Notice No. 19 issued by the 2<sup>nd</sup> Respondent on 6<sup>th</sup> February 2022, mandating the deduction of agency fees, is irrational and disproportionate. The notice equates the agency fees for non-members to the union dues of members, despite non-members receiving limited benefits, such as collective bargaining agreements negotiated every four years. This action is said to contravene Articles 27, 36, and 41 of the Constitution of Kenya, 2010, which guarantee non-discrimination, freedom of association, and fair labor practices. Additionally, the deduction of wages without

adequate regulatory mechanisms breaches Articles 27, 40, and 41 and violates Part IV of the Employment Act, 2007, specifically Section 19(f).

- 11 The Petitioner emphasizes that agency fees are not proportionate to the services rendered to non-members and lack statutory mechanisms to ensure proper management and accountability. The 5<sup>th</sup> Respondent, a minority trade union with an estimated 31,000 members, is purportedly extending its influence over 88,373 employees, which the Petitioner claims is inconsistent with Sections 39–50 of the Labour Relations Act. The legal framework in Kenya, as articulated in Sections 14(1)(d)(1), 24, and 54 of the Labour Relations Act, favours majoritarian trade unions and does not support the imposition of obligations by minority unions on non-members. The Petitioner contends that in jurisdictions recognizing minority trade unions, their activities are strictly limited to their members.
- 12 This imposition of agency fees and the resultant partial membership of officers performing statutory functions under the 2<sup>nd</sup> Respondent, the Petitioner argues, compromises their

independence and impartiality, which are critical to their statutory roles. The Petitioner maintains that this practice is unknown in other legal jurisdictions and is not supported by Kenyan law. The continuation of such actions, if unchecked, will lead to ongoing injury to non-members and perpetuate constitutional violations.

- 13 The petitioner challenges the constitutionality and application of various provisions of the Labour Relations Act, particularly Sections 2, 14(1)(d)(i), 49, and 54, in light of the Constitution of Kenya, 2010. The petitioner contends that these provisions, as currently interpreted and implemented, undermine the rights of employees, particularly the principles of fair labour practices and democratic representation enshrined in Articles 1(1), 1(2), 10, 27(1), 27(2), 36, 40, 41, and 47 of the Constitution. Specifically, the petitioner argues that the requirement for agency fees under Section 49 of the Labour Relations Act, as implemented through Legal Notice No. 19 of 2022, violates the rights of non-unionized employees by subjecting them to deductions from their wages without their consent or participation. This, the petitioner asserts, is inconsistent with Articles 27, 40, and 41 of the Constitution

and constitutes an unfair administrative action contrary to Section 4 of the Fair Administrative Action Act.

- 14 The petitioner further argues that the recognition of trade unions under Sections 14(1)(d)(i) and 54(1) of the Labour Relations Act should be based on democratic principles, requiring that only trade unions enjoying the majority acceptance of employees in a bargaining unit can negotiate and enter into agreements on their behalf. The petitioner asserts that the application of agency fees to employees who are not members of the representative trade union violates the democratic values of participation and good governance as envisaged in the Constitution. The petitioner emphasizes that representative authority should be determined not merely by written agreements but by the actual membership of a trade union in a bargaining unit.
  
- 15 The petitioner challenges the recognition and collective bargaining authority of the 5th Respondent, asserting that it was a minority trade union at the time it negotiated and concluded the contested Collective Bargaining Agreement (CBA) registered as RCA No. 384 of 2017. The petitioner

contends that minority trade unions lack statutory representative authority to negotiate on behalf of all employees in a bargaining unit, and any purported collective bargaining agreement by such unions subverts the sovereign will of employees and violates Articles 1(1), 1(2), and 10 of the Constitution.

16 The petitioner also raises concerns about the lack of statutory safeguards in the imposition of agency fees, arguing that Section 49 of the Labour Relations Act should be read together with Section 83 to require the development of rules and regulations governing agency fees, including mechanisms for determining pro-rata contributions and ensuring accountability in the use of such funds. The petitioner asserts that the actions of the 2nd and 5th Respondents in implementing agency fee deductions were excessive, discriminatory, and lacked proportionality, violating Articles 27 and 40 of the Constitution and infringing the employees' rights to fair labour practices and fair administrative action.

17 Additionally, the petitioner contends that the recognition agreements between employers and trade unions should

include exit clauses allowing for the revocation of recognition agreements in instances where a union fails to maintain the majority representation required under Sections 14 and 54 of the Labour Relations Act. The petitioner seeks the Court's interpretation of "collective" within the context of collective bargaining, arguing that true collective bargaining requires quality and quantity participation from employees at all levels, as mandated by Articles 1(1), 1(2), and 10 of the Constitution.

- 18 In conclusion, the petitioner asserts that the statutory framework governing trade unions and agency fees should be reformed to ensure alignment with the principles of democracy, accountability, and employee sovereignty as provided under the Constitution. The petitioner further calls for the amendment or deletion of Section 54(6) of the Labour Relations Act to allow for more flexible mechanisms for resolving disputes related to recognition agreements and agency fees. The petitioner maintains that the current legal regime disproportionately favors minority trade unions, undermining the rights and interests of employees as a collective class.

19 The Petitioner further asserts that the practice of a trade union retaining recognition despite losing a simple majority undermines the constitutional and statutory rights of other organizers to register and operate new trade unions. This practice is argued to contravene Section 54(1) of the Labour Relations Act and Articles 36 and 41 of the Constitution, which safeguard the rights to freedom of association and fair labour practices. The Petitioner contends that a Recognition Agreement is not intended to be permanent but must be sustained through continuous recruitment of new members. An employer's decision to maintain such agreements with minority trade unions allegedly infringes on the rights of employees.

20 The Petitioner also highlights the statutory functions established under the Labour Institutions Act and the Occupational Safety and Health Act, which include law enforcement, workplace inspections, and conciliation between employers and employees or their associations. To effectively discharge these duties, impartiality and independence are paramount. The Petitioner argues that public officers tasked with these responsibilities cannot serve effectively if they are

members of trade unions or management, as this creates a conflict of interest. The Petitioner suggests that the 2<sup>nd</sup> Respondent should introduce regulations or propose amendments to the Labour Relations Act to ensure these officers remain independent and impartial.

21 The Petitioner alleges that several constitutional provisions have been violated or are under threat. These include Articles 10, 19, 20, 22, 23, 27, 28, 29, 36, 41, and 47 of the Constitution of Kenya, 2010. The Petitioner emphasizes the importance of national values and principles of governance under Article 10, including human dignity, equity, inclusiveness, democracy, accountability, and sustainable development. The Bill of Rights, as outlined in Articles 19 and 20, is presented as central to Kenya's democratic state, safeguarding dignity, equality, and freedom while mandating state organs and individuals to uphold and promote these rights. Article 22 empowers every individual to seek legal redress for any infringement or threat to these rights.

22 The Petitioner specifically alleges violations of Article 27 on equality and non-discrimination, highlighting that every

individual is entitled to equal protection and benefit of the law. The Petitioner asserts that any form of discrimination, whether direct or indirect, is prohibited under the Constitution. Article 28 is cited to underscore the inherent dignity of every person and the obligation to respect and protect that dignity. Similarly, Article 29 guarantees the right to freedom and security of the person, which includes protection from violence, torture, or cruel and degrading treatment.

- 23 The right to freedom of association under Article 36 is also invoked, emphasizing that individuals have the right to form, join, or participate in the activities of associations of their choice and cannot be compelled to join any association. The Petitioner further references Article 41, which affirms every worker's right to fair labour practices, including the right to form, join, and participate in the activities of trade unions. Article 47 is cited to stress the right to fair administrative action, which must be lawful, reasonable, and procedurally fair.

24 The Petitioner contends that the statutory actions under Section 49 of the Labour Relations Act, 2007, together with the orders issued by the 2<sup>nd</sup> Respondent through Kenya Gazette Legal Notice No. 19 dated 26<sup>th</sup> January 2022 and published on 6<sup>th</sup> February 2022, fail to meet the statutory and constitutional thresholds as outlined under the Fair Administrative Action Act, No. 4 of 2015, and the Constitution of Kenya, 2010. It is argued that these statutory actions offend Articles 36 and 41 of the Constitution, which guarantee the right to freedom of association and fair labour practices, respectively. The Petitioner asserts that the application of Section 49 of the Labour Relations Act, 2007, violates constitutional principles because unionizable employees, whether in the civil service or under private employers, are excluded from the processes leading to the issuance of agency fee deduction orders by the 2<sup>nd</sup> Respondent. The lack of statutory regulation providing mechanisms for involving all employees affected by decisions under Section 49 of the Labour Relations Act is claimed to be unconstitutional. The Petitioner further relies on Section 4 of the Fair Administrative Action Act, 2015, which requires administrative actions to be expeditious, efficient, lawful, reasonable, and procedurally

fair, emphasizing that affected persons must be granted notice, an opportunity to be heard, and access to reasons for the decisions taken. It is submitted that the 2<sup>nd</sup> Respondent failed to adhere to these requirements.

25 Additionally, the Petitioner raises concerns about the application of Section 39 of the Labour Relations Act, 2007, which regulates the use of union funds, and Section 48, which governs the deduction of trade union dues and membership rights. The Petitioner asserts that these provisions, when coupled with Section 49, lack safeguards to protect employees who may wish to resign from trade unions, as outlined under Article 41 of the Constitution. It is alleged that these statutory provisions do not provide adequate procedures for transparency and participation by all employees affected, thus infringing on their constitutional rights. Reference is made to the statutory requirement under Section 4 of the Labour Relations Act, 2007, which guarantees an employee's right to join, leave, or participate in trade union activities and further asserts that these rights are being undermined by the implementation of Section 49 without due consideration for individual autonomy and choice. The Petition highlights the

conflict between the statutory framework and constitutional provisions safeguarding freedom of association, fair labor practices, and administrative justice. The Petitioner asserts that the 2<sup>nd</sup> Respondent's actions are arbitrary, procedurally flawed, and contrary to the principles of fairness and inclusivity enshrined in the Constitution and statutory law.

26 From the foregoing, the Petitioner is urging this Honourable to enter judgment in its favour, and pray that: -

1. An order of declaration does issue that officers of the 2<sup>nd</sup> Respondent performing statutory functions as Labour Officers, Occupational and Safety Officers, Registrars and any other such officers performing duties in relation to enforcement of labour and employment should be eligible members of a Trade union and or management.
2. An order of declaration does issue that no Trade Union which does not enjoy simple majority (representative trade union) should enter collective agreement on behalf of all unionizable employees in a sector, trade and or industry.

3. An order of declaration does issue that no Recognition Agreement will have the effect of the law, when at entering any collective agreement, that union did not enjoy simple majority.
4. An order of declaration does issue that Section 49 of the Labour Relations Act, providing for payment of agency fees by non-members of a trade union, as currently constructed violates the rights of those employees.
5. An order of injunction does issue to restrain/prohibit deductions of membership / agency fees from officers of the 2<sup>nd</sup> Respondent, performing statutory duties, which require them to remain independent impartial.
6. An order of injunction does issue to suspend the operation of Section 49 of the Labour Relations Act, until amendments are made to it and or regulations are put in place to protect the rights of non-members of trade unions from violations.
7. An order of injunction does issue against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents from effecting the Order of the 2<sup>nd</sup>

Respondent, issued in Legal Notice No. 19 dated 26<sup>th</sup> October 2022 and published in the Kenya Gazette on 6<sup>th</sup> February 2022.

8. An order of certiorari does issue to bring into this Honourable Section 54(6) of Labour Relations Act, 2007, and the same to be quashed or /and deleted.
  9. An order of certiorari does issue to bring into this Honourable Court the Legal Notice No. 19 dated 26<sup>th</sup> October 2022 and published in the Kenya Gazette on 6<sup>th</sup> February 2022, and the same to be quashed.
  10. Any other relief this Honourable may deem to grant.
  11. Costs for this Petition be borne by Respondents.
- 27 In a Supporting Affidavit dated 17<sup>th</sup> March 2023, sworn by Omechi Ongera, a Kenyan adult male and Secretary of the Petitioner, the deponent outlines the facts and legal basis in support of the Petition and Notice of Motion Application. The deponent affirms the Petitioner's status as a Non-Governmental Organization registered under section 10 of the

Non-Governmental Organizations Co-ordination Act, No. 19 of 1990, with a constitutional mandate to promote good governance and advocate for human rights in labour and employment matters. The affidavit cites that the 5<sup>th</sup> Respondent is a registered trade union under the Labour Relations Act, 2007, with membership representing unionizable employees in the civil service but excluding professional trade unions. It is noted that the 5<sup>th</sup> Respondent has a membership of fewer than 31,000 out of 120,371 eligible unionizable civil servants.

- 28 The affidavit addresses the 2<sup>nd</sup> Respondent's issuance of Legal Notice No. 19, dated 26<sup>th</sup> January 2022, and published in the Kenya Gazette on 6<sup>th</sup> February 2022. The notice directs the 3<sup>rd</sup> Respondent to deduct an agency fee equivalent to 1.5% of salaries from 88,373 non-union civil servants in favour of the 5<sup>th</sup> Respondent. This directive is based on a Collective Bargaining Agreement (CBA) entered into by the 5<sup>th</sup> Respondent and the government on 1<sup>st</sup> July 2017 for a four-year period, registered under RCA No. 384 of 2017. The affidavit asserts that the agency fee deductions target non-union members who are not employees of the 3<sup>rd</sup> Respondent,

rendering the order legally unenforceable. Furthermore, the inclusion of civil servants up to Job Group "N," who perform independent statutory functions, compromises their impartiality and statutory mandate.

29 The affidavit highlights the statutory functions performed by officers under the Ministry of Labour, including those enumerated under sections 18, 24, 47, and 49 of the Employment Act, 2007, as well as sections 65 to 72 of the Labour Relations Act, 2007. These functions include handling trade disputes, labour inspections, conciliation, occupational safety assessments, and the registration and regulation of trade unions. The affidavit contends that these statutory roles are inherently incompatible with agency fee deductions as they risk compromising the officers' neutrality and effectiveness in fulfilling their mandates. Reference is made to scholarly opinions and research papers that underscore the importance of impartial government officers in fostering harmonious labour relations.

30 The deponent underscores the principles of tripartite cooperation under the Industrial Relations Charter of 1984,

which delineates the roles of the government as an impartial arbiter, distinct from employers and employees. The affidavit contends that the application of sections 48 and 49 of the Labour Relations Act, 2007, without appropriate regulatory safeguards under section 83, risks undermining this neutrality, resulting in conflicts of interest, labour instability, and economic disruption. The affidavit further argues that the inclusion of certain civil servants in the scope of agency fee deductions conflicts with their statutory obligations, as exemplified under various sections of the Labour Institutions Act, 2007, the Occupational Safety and Health Act, 2007, and the Work Injury Benefits Act (WIBA).

- 31 The Petitioner asserts that the application of section 48 of the Labour Relations Act, 2007, must be reconsidered in light of Articles 24 and 41 of the Constitution of Kenya, 2010. This reconsideration is deemed necessary to preserve the principles of tripartite cooperation and ensure adherence to the Industrial Relations Charter, which serves as the foundation of Kenya's labour statutes. The deponent emphasizes that the government's role as an impartial arbiter

is critical to maintaining industrial harmony and economic growth.

32 The Petitioner further avers that trade unions operate democratically, as evidenced by the provisions of Articles 14, 15, 16, 18, and 19 of the 5<sup>th</sup> Respondent's Constitution, which delineate the powers and functions of its organs, branches, and national delegates conference. The Petitioner states that elections at all levels within the union are conducted on a one-person, one-vote basis, and any amendments to the Constitution or increments in annual subscriptions require approval from a properly convened conference, with prior notice and specific agenda communicated to all members. The conference must review and pass the proposed budget for the next financial year and the audited accounts of the previous year.

33 The Petitioner clarifies that most trade unions in Kenya have established branches registered under Section 25 of the Labour Relations Act, with annual general meetings conducted for all members at the branch level. These meetings serve as a platform to initiate and endorse

conference agendas in a democratic manner. In unions with large memberships, delegates to the national conference are elected at branch meetings and carry resolutions passed by their respective branches. These delegates represent their branches on all agenda items discussed at the conference.

- 34 The Petitioner asserts that no trade union Constitution, including that of the 5<sup>th</sup> Respondent, grants authority to discuss, resolve, or impose contributions such as agency fees on non-members. Constitutions provide for quorums required to amend their provisions, and the imposition of such fees lacks a clear mandate from any recognized forum. The Petitioner questions the legitimacy of agency fees imposed on non-members and contends that Section 49 of the Labour Relations Act discriminates against employees who are not union members by failing to subject them to the same participatory and democratic processes as union members.
- 35 The Petitioner elaborates on the history of the agency fee doctrine, noting that it permits deductions from unionisable employees who benefit from collective bargaining agreements. However, the Petitioner contends that Section 49

of the Labour Relations Act lacks statutory limitations or regulations as contemplated under Section 83 of the Act. The Petitioner highlights that trade unions historically provided strong representation to employees, and membership was virtually indispensable, but this dynamic has shifted due to perceived ineffectiveness of unions, leading many employees to opt out of membership while still being subjected to agency fees.

36 The Petitioner references Legal Notice No. 19 dated 26<sup>th</sup> January 2022, published in the Kenya Gazette on 6<sup>th</sup> February 2022, directing the deduction of agency fees from 88,373 non-members of the 5<sup>th</sup> Respondent. The Petitioner contrasts this number with the 31,998 members declared by the 5<sup>th</sup> Respondent in 2020, asserting that non-members effectively become the main financial contributors to the union, raising questions about accountability.

37 The Petitioner argues that the imposition of agency fees equal to membership fees is irrational and unreasonable, necessitating regulations that align fees with the level of service provided to non-members. The Petitioner asserts that

the lack of mechanisms for non-members to participate in determining agency fees or for the union to be accountable to them renders Section 49 of the Labour Relations Act oppressive and unconstitutional.

38 The Petitioner emphasizes the importance of adhering to Section 54 of the Labour Relations Act, which requires a union to demonstrate majority representation within the bargaining unit. The Petitioner asserts that the 5<sup>th</sup> Respondent, with approximately 31,000 members out of a possible 120,371 unionisable employees, lacks the requisite majority to represent employees in negotiating collective bargaining agreements, thereby undermining its authority. The Petitioner further asserts that the recognition of trade unions under Sections 14(1)(d)(i) and 54(1) of the Labour Relations Act is contingent upon achieving and maintaining majority representation, which the 5<sup>th</sup> Respondent has failed to demonstrate.

39 The Petitioner filed a supplementary affidavit dated 19<sup>th</sup> November 2024, sworn by Samson Ong'era, stating that as of 31<sup>st</sup> December 2023, the 5<sup>th</sup> Respondent had approximately

28,000 members. The Petitioner referred to the 5<sup>th</sup> Respondent's annual returns, submitted to the 3<sup>rd</sup> Interested Party for the years 2021, 2022, and 2023, which showed registered memberships of 31,211, 31,691, and 27,616, respectively. The Petitioner reiterated that the 5<sup>th</sup> Respondent intended to deduct agency fees from the wages of more than 88,000 employees, yet the list containing the names of these employees was not gazetted as required under Section 49(2)(b) of the Labour Relations Act, 2007.

- 40 The Petitioner noted that the 3<sup>rd</sup> Respondent's response to the petition relied solely on Legal Notice No. 19 dated 26<sup>th</sup> January 2022, which was not accompanied by the mandated list of affected employees. The Petitioner emphasized that the gazetted order did not comply with Section 49 of the Labour Relations Act, 2007, rendering it unenforceable. These averments were made based on the Petitioner's knowledge, information, and belief.

#### Petitioner's Written Submissions

- 41 The petitioner filed written submissions dated 19<sup>th</sup> November 2024, asserting their position as a Non-Governmental

Organization established under the NGO Coordination Act and emphasizing that the petition is filed as public interest litigation to promote the principles of the Bill of Rights and Fundamental Freedoms for employees who are unionizable but are not members of a trade union. The petitioner highlighted the application of Articles 27, 36, 41, 43, and 47 of the Constitution, inviting the Honourable Court to interrogate and interpret the purpose of Section 4(1)(a) of the Labour Relations Act in light of Article 41(2)(c) and Articles 36(1) and (2), and to determine the implications for employees exercising their rights under these provisions.

- 42 The petitioner contended that Section 4(1)(a) of the Labour Relations Act grants employees the right to leave or refuse to join a trade union, and argued that the continued collective bargaining by a trade union without a majority undermines the constitutional freedoms under Articles 36(1) and (2) and the protection against unfair labour practices under Article 41(1). The submissions urged the Court to assess whether such practices amount to compelled speech and association and contravene the democratic values enshrined in Article 10(2) of the Constitution.

- 43 The petitioner further submitted that the charging of agency fees at the same rate as union membership subscriptions, without proportionate benefits to non-members, violates Articles 27(1) and (2) of the Constitution, which guarantee equality and freedom from discrimination. They argued that Sections 49(1) and (2) of the Labour Relations Act permit trade unions to levy agency fees on unionizable employees who are not members, but the absence of clear procedures for notifying or involving affected employees in this process violates Articles 41(1) and 47(2) of the Constitution and Sections 4 and 5 of the Fair Administrative Action Act.
- 44 The petitioner also raised concerns about Sections 4, 8, and 14(1)(d)(ii) of the Labour Relations Act, arguing that these provisions need to align with the democratic principles of good governance outlined in Article 10(2) of the Constitution. They emphasized the significance of the right to associate or disassociate under Articles 36(1) and (2) and argued that trade unions lacking majority representation should not continue to engage in collective bargaining. They invited the Court to examine whether a trade union losing its simple

majority forfeits its recognition status under Section 14(1)(d)(ii) and whether continued reliance on such agreements infringes on constitutional freedoms under Articles 36 and 41.

45 The petitioner argued that Section 54 of the Labour Relations Act requires reconsideration to address inconsistencies between subsections (1) and (6). Subsection (1) establishes that an employer shall recognize a trade union with a simple majority, but subsection (6) grants the National Labour Board powers to terminate recognition agreements, which the petitioner considers an interference with contractual principles. The submissions questioned whether recognition agreements are perpetual and whether a trade union losing majority representation should maintain such agreements.

46 Additionally, the petitioner sought clarity on the place of the Industrial Relations Charter, 1984, post-Constitution of Kenya 2010, and the implications for tripartite cooperation structures. They invited the Court to determine whether employees performing special or confidential functions,

particularly those within the public sector, should be excluded from trade union membership to preserve impartiality.

47 The petitioner seeks the following orders/reliefs: -

1. An order of declaration does issue that officers of the 2<sup>nd</sup> Respondent performing statutory functions as labour officers, occupational and safety health officers, Work Injury Benefit Officers and Registrars and any other such officers performing the duties in relation to enforcement of labour and employment should not be legible members of a trade union and or management.
2. An order of declaration does issue that no trade union which does not enjoy simple majority (representative trade union) should enter collective agreement on behalf of all unionizable employees in a sector, trade and or industry.
3. An order of declaration does issue that no Recognition Agreement will have the effect of the law, when at entering any collective agreement, that union did not enjoy simple majority.

4. An order of declaration does issue that Section 49 of the Labour Relations Act providing for payment of agency fees by non-members of a trade union as currently constructed violates the rights of those employees.
5. An order of injunction does issue to restrain/prohibit deductions of membership/agency fees from officers of the 2nd respondent performing statutory duties, which require them to remain independent and or impartial;
6. An order of injunction does issue to suspend the operation of Section 49 of the Labour Relations Act, until amendments are made to it and or regulations are put in place to protect the rights of non-members of trade unions from violations.
7. An order of injunction does issue against the 1<sup>st</sup> and 2<sup>nd</sup> respondents from effecting the order of the 2<sup>nd</sup> respondent issued in Legal Notice No. 19 dated 26<sup>th</sup> January, 2012 and published in the Kenya Gazette on 6<sup>th</sup> February, 2022.
8. An order of certiorari does issue to bring into this Honourable Court Section 56(6) of the Labour Relations Act, 2007 and the same be quashed or /and deleted;

9. An order of certiorari does issue to bring into this Honourable Court the Legal Notice No. 19 dated 26th January, 2012 and published in the Kenya Gazette on 6<sup>th</sup> February, 2022 and the same be quashed;
  10. Any other relief this honourable court may deem fit to grant.
  11. Costs for the petition be borne by Respondents.
- 48 The petitioner sought injunctive reliefs to prevent the deduction of agency fees from non-union members and officers of the 2<sup>nd</sup> respondent performing statutory duties, emphasizing the importance of protecting their independence and impartiality. They further argued that the current framework under Section 49 of the Labour Relations Act and Legal Notice No. 19 of 2012 contravenes the constitutional rights of non-unionized employees, particularly under Articles 36 and 41 of the Constitution, and should be quashed or suspended until appropriate amendments or regulations are put in place. The petitioner underscored the need for proportionality and rationality in addressing the imposition of agency fees, aligning administrative actions with constitutional and statutory provisions.

49 The petitioner also invited the Honourable Court to provide guidance on the scope and applicability of the Industrial Relations Charter, particularly regarding the constitutional right to collective bargaining under Article 41(5), and the role of employers and employees in new bargaining units. They highlighted the need to protect confidential and special functions within the government and public sector, urging that such employees should not belong to trade unions to preserve the integrity of their roles.

50 The petitioner argued for substantive amendments to the Labour Relations Act and the implementation of appropriate regulations to protect employees' constitutional rights, ensure democratic principles in labour relations, and maintain the independence of statutory officers. They sought various declaratory and injunctive orders to address the issues raised in the petition and ensure compliance with the Constitution.

51 The petitioner further invites the Honourable Court to consider the statutory framework governing the labour sector, particularly the application of the Labour Institutions Act, Labour Relations Act, Occupational Safety and Health Act, and

Work Injury Benefits Act, in relation to the Industrial Relations Charter of 1984. It is submitted that the officers appointed under the 2<sup>nd</sup> Respondent, tasked with statutory functions to ensure tripartite cooperation among labour sector players, must retain impartiality, which would be compromised if they are members of trade unions. The petitioner posits that the 2<sup>nd</sup> Respondent should either establish regulations or amend Section 4 of the Labour Relations Act to exclude such officers from trade union membership.

- 52 The petitioner urges the Court to interpret the Constitution under Article 259(3) to examine whether Section 49 of the Labour Relations Act aligns with Articles 19, 20, 21, 27, 40, 41, and 47. Specifically, the petitioner raises concerns regarding the fair administrative action required to protect unionizable employees who are not members of trade unions from arbitrary decisions made by the 2<sup>nd</sup> Respondent and trade unions. It is argued that the provisions of Section 49 fail to provide a mechanism for employees to contest decisions, contrary to Articles 47(2) of the Constitution and Sections 4 and 5 of the Fair Administrative Action Act, 2015.

- 53 The petitioner further asserts that the 2<sup>nd</sup> Respondent, as a state agency, has a constitutional duty under Articles 19, 20, and 21 to safeguard the rights of all employees, including non-unionized ones. This duty extends to guaranteeing the fundamental rights and freedoms outlined in Articles 27, 36, 41, and 47, ensuring that such employees are not discriminated against in comparison to trade union members.
- 54 The petitioner challenges the legality and constitutionality of Legal Notice No. 19 of 2022, which directed the 3<sup>rd</sup> Respondent to deduct agency fees from unionizable employees in the civil service who are not members of the 5<sup>th</sup> Respondent. It is contended that this directive, issued pursuant to Section 49(1) of the Labour Relations Act, did not comply with Section 49(2)(b), as the 5<sup>th</sup> Respondent failed to provide a list of affected employees to the 2<sup>nd</sup> Respondent. Consequently, the order under the Legal Notice is alleged to have been issued in contravention of Section 49(1) and (2) and is thus invalid and incapable of enforcement.
- 55 The petitioner argues that the deduction of agency fees from wages, as provided under Section 49(1), violates the

principles enshrined in Article 47(2) and Section 4 of the Fair Administrative Action Act, which mandate proper notification to employees affected by such decisions. The petitioner emphasizes that deductions from employees' wages must adhere to the requirements under Section 19 of the Employment Act, which permits deductions only as statutory deductions, by court order, or with the employee's consent. The petitioner asserts that the employees affected by the agency fees deduction have been denied their right to participate in the decision-making process, contravening their constitutional rights under Articles 40 and 41.

56 Further, the petitioner highlights the importance of impartiality for officers appointed under the Labour Institutions Act, Occupational Safety and Health Act, and Work Injury Benefits Act. These officers perform statutory functions such as enforcing labour laws, guaranteeing workplace safety, arbitrating disputes, and ensuring compliance with minimum wage and employment standards. It is contended that unionization of such officers compromises their impartiality and creates a conflict of interest, contrary to the common law principle that no person should be a judge in their own case.

The petitioner relies on the Industrial Relations Charter and the principles set out in the Code of Good Practice: Resolution of Disputes at the Workplace to support the exclusion of these officers from trade union membership.

57 The petitioner also submits that the provisions of Section 49 of the Labour Relations Act do not include an internal mechanism for redress by unionizable employees who are not members of a trade union. This omission is said to violate constitutional and statutory provisions, including Articles 47(2) and 50 of the Constitution, and Sections 4 and 5 of the Fair Administrative Action Act. The petitioner argues that regulations under Section 83 of the Labour Relations Act are necessary to align the law with constitutional requirements.

58 The petitioner contends that the 2<sup>nd</sup> Respondent, as a state officer, is constitutionally obligated to ensure the enjoyment of fundamental rights under Articles 19, 20, 21, 40, 41, and 47. This includes ensuring that decisions affecting employees, such as deductions of agency fees, are made transparently, equitably, and with mechanisms for redress. It is asserted that the 2<sup>nd</sup> Respondent must act impartially and protect all

employees, regardless of union membership, in accordance with the Constitution and international labour standards recognized under Articles 2(5) and (6). The petitioner urges the Court to interpret Section 49 of the Labour Relations Act in light of these constitutional and statutory obligations.

59 The petitioner further submitted that the decision by the 5<sup>th</sup> Respondent to apply to the 2<sup>nd</sup> Respondent for agency fees at 1.5% of the basic salary of affected employees contravened Articles 27(1) and (2) as well as Article 47(1) of the Constitution. The petitioner argued that the decision lacked proportionality, rationality, and reasonableness, thereby failing the test of procedural fairness required under Article 47(1). Additionally, the petitioner relied on Section 4(2) of the Labour Relations Act to contend that employees who cannot participate in the activities of a trade union should not bear the costs of administering a collective bargain, deeming the decision discriminatory and an unfair labour practice.

60 The petitioner asserted that Sections 14 and 54 of the Labour Relations Act, 2007, by their interpretation, fail to recognize minority trade unions, permitting only unions with a simple

majority to enter collective bargaining agreements. The petitioner claimed this structure violated Articles 10(2)(a) and 41(2) of the Constitution by undermining democracy and employees' rights to representation, effectively excluding minority trade unions and infringing upon democratic governance principles.

61 The petitioner also challenged Section 54(6) of the Labour Relations Act, arguing that the involvement of the National Labour Board in agreements undermines the terms explicitly negotiated between parties. It further contended that Sections 14(1)(d)(ii) and 54(1) were not intended to make agency fees the primary source of funding for trade unions. The petitioner highlighted that the 5<sup>th</sup> Respondent relied on agency fees from 88,073 unionizable employees who were not members, with annual returns reflecting heavy reliance on these fees.

62 The petitioner argued that Section 54(1) of the Labour Relations Act should be interpreted to mandate employers to establish that a trade union maintains a simple majority before entering into or continuing a collective bargaining agreement.

It emphasized that this interpretation would safeguard the democratic rights of employees and ensure that unions genuinely represent the majority.

63 The petitioner relied on Article 233 of the Constitution and Sections 34 to 45 of the Public Service Commission Act to demonstrate that the 1<sup>st</sup> Respondent, as an independent commission, has the character of an employer for civil servants. It submitted that no evidence was provided to show that the 1<sup>st</sup> Respondent delegated its statutory and constitutional functions to the 3<sup>rd</sup> Respondent, further underscoring the lack of legal authority for the implementation of agency fees under Legal Notice No. 19 of 2022.

64 The petitioner contends that the delegation of payroll management to various ministries and departments, as alleged by the 1<sup>st</sup> Respondent, indicates that there may exist more than 20 separate payroll systems within the civil service. It is argued that the 3<sup>rd</sup> Respondent is not the sole employer of all civil servants and that the Legal Notice No. 19 dated 26<sup>th</sup> January 2022, which purported to direct the 3<sup>rd</sup> Respondent

to deduct agency fees, did not comply with Section 49(1) and 49(2)(b) of the Labour Relations Act. The petitioner submits that the said Legal Notice, being an order from the 2<sup>nd</sup> Respondent, only applies to employees in the civil service deployed to the 3<sup>rd</sup> Respondent and not to all employees of the National Government. The lack of a gazetted list of unionizable employees, as required under Section 49(2)(b) of the Labour Relations Act, further renders the order non-compliant with statutory requirements.

65 The petitioner also asserts that officers appointed under statutes such as the Labour Institutions Act, Occupational Safety and Health Act, and Work Injury Benefit Act perform statutory functions that require impartiality and independence. These officers are tasked with enforcement duties such as inspecting workplaces, hearing disputes, and prosecuting offenses. Unionization of these officers, the petitioner argues, creates a conflict of interest and compromises their impartiality, as it would place them in situations where they may be perceived as biased or acting in their own interests. This, according to the petitioner, contravenes the principles of fair industrial relations as

outlined in the Industrial Relations Charter, 1984. The petitioner relies on the Court of Appeal decision in **Olive Mwihaki Mugendi & Another v Okiya Omtatah Okoiti & 4 Others [2016] eKLR**, which underscores the importance of adherence to statutory procedures.

66 The petitioner further submits that the officers appointed to perform statutory functions under the Labour Institutions Act, Occupational Safety and Health Act, and Work Injury Benefit Act, as well as those under related statutes such as the Employment Act and Labour Relations Act, hold roles that involve inspection, dispute resolution, enforcement, and prosecution. These functions necessitate impartiality, independence, and the absence of any conflicts of interest to ensure effective service delivery to the public, employers, and employees.

67 The petitioner contends that the unionization of such officers would compromise their ability to execute their statutory duties impartially, as they would effectively be sitting on cases in which their own unions could be involved, violating the principle that one cannot be a judge in their own case. This

concern is anchored on both the practical implications of perceived bias and the principles of the Industrial Relations Charter of 1984, which sought to separate such officers from trade union membership to maintain their impartiality.

68 The petitioner relies on the academic opinion of Owidhi George Otieno, who underscores the critical roles of statutory officers in ensuring fair industrial relations, protecting public interests, and enforcing labour standards. It is argued that such officers cannot be members of trade unions, as this would undermine their role in facilitating tripartite cooperation and compromise their responsibilities to represent the government's interests.

69 The petitioner also emphasizes that the Labour Institutions Act and other statutes mandate these officers to guarantee the rights and protections afforded under both national and international laws, which require them to remain free from any conflict arising from union membership.

70 On the issue of collective bargaining, the petitioner argues that recognition agreements must be understood as temporary certifications tied to a trade union's ability to maintain a simple majority of representation. The petitioner submits that trade unions that lose the simple majority should not continue to enter collective bargaining agreements, as this would violate democratic principles and employees' rights to freedom of association under Article 36(1) of the Constitution.

71 The petitioner asserts that democracy, as enshrined in Article 10(2) of the Constitution, requires that trade unions derive their legitimacy from the approval of a majority of the employees they represent. A trade union that lacks this majority ceases to be representative and cannot validly act as a bargaining agent, as doing so would undermine employees' constitutional rights to fair labour practices under Article 41(2) of the Constitution.

72 The petitioner highlights that Section 54(1) of the Labour Relations Act provides that only trade unions meeting the simple majority threshold can be recognized by employers for purposes of collective bargaining. It is further submitted that

Sections 14(1)(d)(ii) and 4(1) of the Labour Relations Act underscore the majoritarian principle in trade union recognition, which is fundamental to ensuring sufficient and substantial representation of employees. The petitioner also notes that allowing a trade union without a simple majority to act as a bargaining agent would contravene the statutory intent and deny employees their freedom of association.

73 The petitioner references Article 41(2)(c) of the Constitution, which protects workers' rights to form, join, or participate in trade union activities, and argues that these provisions emphasize the importance of empowering employees to choose their representation freely.

74 The petitioner concludes that trade unions that lose the simple majority cannot continue to act as representative bargaining agents without violating constitutional provisions on freedom of association, democracy, and fair labour practices. It is submitted that the lack of statutory clarity on the effective date for a trade union to cease acting as a bargaining unit after losing the majority must be interpreted in a manner that upholds the democratic will of employees. A union that lacks

majority support contravenes the principles of good governance and democracy as set out in Article 10(2) of the Constitution. The petitioner urges that collective bargaining decisions made by such unions are undemocratic and incapable of upholding the values of transparency and accountability required under the law.

75 The Petitioner submitted that Section 54(1) of the Labour Relations Act must be interpreted in light of the freedom of association contemplated by Article 36(1) and (2) of the Constitution. The purpose of a recognition agreement, they argued, must be interrogated to determine whether its application aligns with the intended freedom of association, especially for employees who decline to join or have left a trade union. The Petitioner submitted that the application of the recognition agreement has impeded the right to freedom of association, as envisioned under Section 4(1)(a) of the Labour Relations Act.

76 The Petitioner asserted that the simple majority requirement under Section 54(1) of the Labour Relations Act is a mandatory threshold for a trade union to engage in collective

bargaining. This threshold, they argued, ensures a democratic process consistent with constitutional values under Article 10(2) of the Constitution. They compared this requirement to parliamentary processes under Article 108, where the majority determines representation. The Petitioner submitted that the recognition agreement should only remain valid when the trade union maintains a simple majority.

77 The Petitioner also argued that the deduction of agency fees under Section 49 of the Labour Relations Act affects the property rights of employees, as wages are constitutionally protected under Article 40(3). They submitted that such deductions without notifying affected employees or providing written reasons contravene Articles 47(2) and 50(2) of the Constitution, as the deductions constitute adverse administrative actions. The Petitioner relied on the persuasive authority of **Janus v American Federation of State, County and Municipal Employees Council, 31, et al. (2018)**, where it was held that non-members must be informed of agency fee deductions.

78 The Petitioner further invited the Court to consider whether the National Labour Board, as constituted under the Labour Institutions Act, effectively facilitates freedom of association. They submitted that its periodic and resource-dependent operations may impede employees' ability to form trade unions. They relied on **S B M & another v Attorney General (Constitutional Petition 21 of 2021) [2022] KEHC 13920 (KLR)**, which emphasized the importance of administrative actions conforming to constitutional imperatives.

79 The Petitioner challenged the proportionality, reasonableness, and rationality of charging agency fees at the same rate as membership fees, arguing that non-members benefit from only one objective of the trade union's operations. They cited **Harksen v Lane NO [1997] ZACC 12 and Janus v American Federation of State, County and Municipal Employees Council, 31, et al. (2018)**, which underscored the importance of avoiding forced association and ensuring charges reflect actual service delivery.

80 Finally, the Petitioner relied on the following cases and statutory provisions to support their submissions:

1. S B M & another v Attorney General (Constitutional Petition 21 of 2021) [2022] KEHC 13920 (KLR).
2. Janus v American Federation of State, County and Municipal Employees Council, 31, et al. (2018).
3. Prinsloo v Van Der Linde [1997] ZACC 5.
4. Robert Alai v The Hon Attorney General & another [2017] eKLR.
5. Olum and another v Attorney General [2002] 2 EA.
6. MC & another v Kipyegon & 5 others (Petition E514 of 2021) [2024] KEHC 10387 (KLR).
7. Glenister v President of the Republic of South Africa and Others [2011] ZACC 6.

#### Petitioner's Supplementary Affidavit

81 The Petitioner filed a Supplementary Affidavit dated 1<sup>st</sup> February 2024, reiterating its position that the Grounds of Opposition dated 3<sup>rd</sup> January 2024 and the Replying Affidavit sworn on 17<sup>th</sup> January 2024 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>

Respondents and the 3<sup>rd</sup> Interested Party were filed without leave of the court and after the closure of pleadings. The Petitioner argued that these documents re-opened issues already determined, including a Preliminary Objection dismissed by the court on 29<sup>th</sup> September 2023, contrary to procedural fairness and the principle that parties are bound by their pleadings. The Petitioner submitted that admitting these belated documents would prejudice its case and urged the court to strike them out or dismiss them with costs.

- 82 The Petitioner responded to the 5<sup>th</sup> Respondent's submissions dated 29<sup>th</sup> December 2023, asserting that the Respondent misunderstood the Petition, which challenges the applicability of sections 49 and 54(6) of the Labour Relations Act, 2007, against the provisions of Articles 27, 41, and 47 of the Constitution of Kenya, 2010. The Petitioner maintained that while section 49 of the Labour Relations Act was not directly challenged, its implementation violated constitutional principles of equality, equity, and fair labour practices. The Petitioner argued that the 5<sup>th</sup> Respondent, in applying for agency fee deductions, failed to comply with constitutional requirements and lacked regulations under section 83 of the

Act. It further noted that the agency fee charged equaled union dues without a clear, participatory mechanism for determining the deductible amount, rendering the process arbitrary and unconstitutional.

- 83 The Petitioner contended that the law under section 49 of the Labour Relations Act lacked redress mechanisms for affected employees, contrary to Articles 27, 41, and 47 of the Constitution. It distinguished the cases relied on by the 5<sup>th</sup> Respondent, including **Kenya Aviation Workers Union v Bollore Africa Logistics – Kenya & another [2016] eKLR**, **Tailors & Textiles Workers Union v New Wide Garments Kenya (EPZ) Limited [2013] eKLR**, and **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR**, arguing that these cases addressed claims rather than the constitutionality and application of section 49. The Petitioner also cited the US Supreme Court’s decision in **Janus v American Federation of State, County, and Municipal Employees, Council 31, et al (2018)**, which overruled earlier rulings, including **Communication Workers of America v Beck (1988)**, declaring agency fees unconstitutional in the public sector.

84 Regarding submissions by the 1st, 2nd, 3rd, 4th Respondents and the 3rd Interested Party dated 9th January 2024, the Petitioner reiterated its objection to their Grounds of Opposition and Replying Affidavit, asserting that these submissions were tied to improperly filed documents and, therefore, required no rejoinder.

85 In conclusion, the Petitioner opposed the 5<sup>th</sup> Respondent's submissions and emphasized that the case raised substantial questions of law concerning sections 49 and 54(6) of the Labour Relations Act, 2007, warranting judicial consideration. The Petitioner argued that granting conservatory orders would protect affected employees from ongoing harm caused by agency fee deductions.

### **1<sup>st</sup> Respondent's Case**

86 Through a replying affidavit dated 24<sup>th</sup> April 2023, the 1<sup>st</sup> Respondent, through Simon K. Rotich, who is the Commission Secretary and Chief Executive Officer of the Public Service Commission, stated that the 1<sup>st</sup> Respondent has been wrongly

joined to the suit. The 1<sup>st</sup> Respondent asserted that it is not a party to the Collective Bargaining Agreement being challenged and did not participate in issuing Legal Notice No. 19 dated 26<sup>th</sup> January 2022 and published on 6<sup>th</sup> February 2022. It was further stated that the 1<sup>st</sup> Respondent is not responsible for managing the payroll for civil servants and, therefore, lacks the authority to stop the implementation of the Gazette Notice being challenged. Additionally, the 1<sup>st</sup> Respondent denied imposing any association on the unionisable employees as alleged by the Petitioner. Consequently, the 1<sup>st</sup> Respondent prayed for the dismissal of the suit against it with costs.

### **1<sup>st</sup> Respondent's Written Submissions**

87 The 1st Respondent filed written submissions dated 4<sup>th</sup> December 2024, asserting that the petitioner's claims against it are unfounded and lack a legal basis. The 1<sup>st</sup> Respondent argued that it was not a party to the Collective Bargaining Agreement signed on 27<sup>th</sup> June 2017, nor did it issue Legal Notice No. 19 dated 26<sup>th</sup> January 2012, which is the subject of the petition. Furthermore, it emphasized that it does not

manage the payroll of civil servants and cannot be held accountable for the deductions referenced in the petition.

- 88 The 1<sup>st</sup> Respondent stated that the petitioner failed to amend its pleadings to address the issues raised in the replying affidavit and instead relied on assumptions in its submissions. The petitioner's reliance on Article 233(2) of the Constitution and the Public Service Commission Act, 2022, to establish the 1st Respondent's responsibility for the matters in contention was dismissed as speculative and unsupported by evidence.
- 89 The 1<sup>st</sup> Respondent emphasized the principle that the burden of proof lies with the party making allegations, citing Section 107(1) of the Evidence Act, which requires a party to prove the existence of facts upon which they seek a court's judgment. The Court of Appeal's decision in **Anne Nderitu v Joseph Kiprono Ropkoi & Another [2005] EA 334** was cited to reinforce the principle that the legal burden of proof lies on the party invoking the court's jurisdiction and that evidence must substantiate claims made.

90 The 1<sup>st</sup> Respondent argued that the petitioner failed to demonstrate any nexus between the documents produced and the 1<sup>st</sup> Respondent. It maintained that the petitioner's claims were based on assumptions that were not included in the pleadings and could not form the basis of a court's determination. The 1<sup>st</sup> Respondent prayed for the petition to be dismissed with costs, urging the court to reject the petitioner's invitation to make findings based on suppositions rather than concrete evidence.

### **The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 3<sup>rd</sup> Interested Party's Case**

91 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 3<sup>rd</sup> Interested Party filed a replying affidavit dated 17<sup>th</sup> January 2023 through Amos Gathecha, the Principal Secretary in the State Department for Public Service. The affidavit outlines the Respondents' mandate, including coordinating Huduma Centers, managing government human resource information systems, and overseeing public service career planning and development. It emphasizes that the Respondents are conversant with the matters raised in the petition.

92 The affidavit confirms that the Government signed a recognition agreement with the Union of Kenya Civil Servants (UKCS) on 19<sup>th</sup> September 2023, which authorizes the UKCS to negotiate terms and conditions for unionisable staff in the civil service. A collective bargaining agreement (CBA) was signed on 27<sup>th</sup> June 2017, with Clause 18.1.1 stating it remains in force unless terminated by mutual agreement or replaced. Although the recognition agreement does not explicitly specify grades for union membership, it prohibits management-level staff from participating in industrial action or holding union leadership positions. The affidavit clarifies that officers on Job Group 'N,' while designated as Assistant Directors, perform technical work rather than policy-making functions.

93 The affidavit references Section 49(1) of the Labour Relations Act, 2007, which permits the deduction of agency fees from unionisable employees covered by collective agreements. It explains that this provision formed the basis for the Cabinet Secretary for Labour and Social Protection to issue Legal Notice No. 19 of 2022, directing the deduction of agency fees

from the salaries of unionisable employees who are not members of UKCS. The Legal Notice was issued in respect of the CBA registered in the Employment and Labour Relations Court as RCA No. 384 of 2017. The Ministry subsequently issued a circular on 11<sup>th</sup> May 2022 to implement the 1.5% agency fee deduction from the basic salaries of non-union members in accordance with the law.

94 The affidavit asserts that the petitioner has failed to provide sufficient evidence to support the allegations made and to justify the orders sought from the court. Citing Section 107(1) of the Evidence Act, the affidavit emphasizes that the burden of proof lies on the petitioner, who must substantiate their claims with sufficient particularity. The Court is urged to reject the petition, as the orders sought lack merit and are unsupported by evidence.

95 The Respondents argue that the petition is ill-conceived, capricious, and an abuse of the court process, urging the Court to dismiss it with costs. The affidavit concludes that the claims made by the petitioner are frivolous, vexatious, and

without a reasonable cause of action, and therefore, the orders sought should not be granted.

### **The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 3<sup>rd</sup> Interested Party's**

96 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 3<sup>rd</sup> Interested Party filed a Replying Affidavit dated 17<sup>th</sup> January 2023, opposing the Petition on various grounds. They contended that the Petition was misconceived, lacked merit, and amounted to an abuse of the court process. They argued that Legal Notice No. 19 of 26<sup>th</sup> October 2022, which provided for the deduction of agency fees from non-union members who benefit from a Collective Bargaining Agreement (CBA), was issued in compliance with Section 49 of the Labour Relations Act, 2007. This provision expressly permits such deductions and aligns with Section 54(6) of the same Act, which requires non-union members to contribute agency fees as beneficiaries of union negotiations. The Respondents emphasized that these statutory provisions have not been demonstrated to violate the Constitution, and the Petitioner failed to rebut the presumption of their constitutionality, as established in **Ndyanabo v Attorney General (2001) EA 495**. They

further submitted that the Petitioner's reliance on the alleged violation of Articles 27, 41, and 47 of the Constitution was unsubstantiated, as the deductions were lawful and within the framework of the law. They cited **Anarita Karimi Njeru v Republic (1979) eKLR** to assert that constitutional violations must be pleaded with precision, which the Petitioner failed to do.

97 The Respondents also argued that the Employment and Labour Relations Court lacked jurisdiction to address constitutional questions raised by the Petitioner, as these were within the exclusive domain of the High Court under Article 165(3)(d)(i) of the Constitution. They pointed out that the proper remedy for any alleged irregularity in the issuance of the Legal Notice lay within administrative and statutory review mechanisms rather than constitutional litigation. The Respondents contended that the Petitioner lacked locus standi to bring the matter before the court, as they failed to demonstrate direct harm or any mandate to represent the interests of unionisable employees. Relying on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, they asserted that public interest

litigation must be properly grounded and not speculative or frivolous.

98 The Respondents highlighted that the deduction of agency fees was neither discriminatory nor unconstitutional, as it applied uniformly to all non-union employees who benefited from CBAs negotiated by the union, as provided for under Section 49 of the Labour Relations Act. They maintained that the agency fees served to enhance industrial relations by ensuring fair contributions toward union activities from all beneficiaries, as upheld in **Kenya Plantation and Agricultural Workers Union v Kenya Export Floriculture, Horticulture, and Allied Workers Union (2017) eKLR**. The Respondents concluded that the Petition lacked any clear public interest dimension, as the issues raised were speculative and failed to establish any tangible harm to the public. They prayed for the dismissal of the Petition with costs, underscoring the importance of safeguarding judicial resources from misuse and upholding statutory frameworks governing labour relations.

## **5<sup>th</sup> Respondent's Case**

99 The 5<sup>th</sup> Respondent filed a Replying Affidavit dated 18<sup>th</sup> May 2023, sworn by its Secretary General, Tom Mboya Odege, who stated that the 5<sup>th</sup> Respondent is a legally recognized trade union mandated to organize and represent employees in the service of the national and county governments of Kenya concerning their terms and conditions of employment. The 5<sup>th</sup> Respondent denied the allegations in the Certificate of Urgency, Notice of Motion, Petition, and Supporting Affidavit dated 17<sup>th</sup> March 2023, except where explicitly admitted, asserting that the Petitioner had failed to prove the claims made. The 5<sup>th</sup> Respondent admitted to signing a Collective Bargaining Agreement (CBA) dated 27<sup>th</sup> June 2017, which outlined terms and conditions of employment for unionisable employees of the national government. It explained that under Section 49 of the Labour Relations Act, it had the right to charge agency fees from non-union members who benefitted from the CBA and that an order to deduct these fees was issued by the Cabinet Secretary for Labour and Social Protection.

100 The 5<sup>th</sup> Respondent emphasized that the deduction of agency fees is lawful under Section 49(5) of the Labour Relations Act, which allows for such deductions from employees covered by a CBA. It further argued that the deductions did not interfere with employees' statutory duties or compromise their independence and impartiality, and the Petitioner had failed to demonstrate otherwise. Relying on the principle that "he who alleges must prove," the 5<sup>th</sup> Respondent cited **Anarita Karimi Njeru v Republic (1979) eKLR** to assert that constitutional violations must be pleaded with precision, which the Petitioner had not done.

101 The 5<sup>th</sup> Respondent contended that agency fees ensure that non-union members who benefit from CBAs contribute toward the costs incurred by the union during negotiations, thus preventing them from becoming "free riders." It argued that requiring such contributions strengthens industrial relations and is not a violation of freedom of association, as upheld in labour practices globally. The Respondent dismissed claims that its constitution required member approval to operationalize Section 49 of the Labour Relations Act,

asserting that this statutory provision operates independently of trade union constitutions.

102 The 5<sup>th</sup> Respondent denied any conflict of interest or interference with employee functions arising from the agency fee deductions. It argued that the agency fee is a statutory requirement and not subject to the approval of union members or any amendments to the union's constitution. The Respondent also highlighted that the issue of regulating the provisions of the Labour Relations Act falls within the mandate of the Legislature, not the courts, and any grievances regarding the statutory framework should be directed to Parliament. The affidavit reiterated that the deductions were lawful and necessary for equitable industrial relations, consistent with constitutional and statutory provisions.

103 The 5<sup>th</sup> Respondent further contends that the issues raised by the Applicant in paragraph 37 of the Supporting Affidavit were anticipated under section 49 of the Labour Relations Act (LRA). It asserts that members of trade unions are subjected to deductions, including agency fees under section 48, and argues that it would be discriminatory for non-members

benefiting from a Collective Bargaining Agreement (CBA) to avoid such deductions. Members incur higher costs compared to non-members, who only pay agency fees meant to facilitate the process leading to CBA implementation. In response to paragraph 38, the 5<sup>th</sup> Respondent clarifies that agency fees are deducted from unionisable employees, whether members or non-members, who benefit from a CBA. It states that section 83 of the LRA is not mandatory and allows the Minister discretion to make regulations for the Act's implementation.

104 Regarding paragraph 39, the 5<sup>th</sup> Respondent argues that the Applicant misconstrues the application of Article 41(2) of the Constitution and section 4 of the LRA, which empower employees to join or refrain from joining unions. The determination of agency fee percentages lies with Parliament, not the court, and Gazette Notice No. 19 complied with section 49 of the LRA. It emphasizes the distinction between union dues and agency fees under sections 48 and 49 of the LRA, with union dues paid by union members and agency fees by non-members benefiting from union-negotiated CBAs. The 5<sup>th</sup> Respondent disputes the Applicant's claim that non-members do not participate in union activities, stating that

non-members indirectly benefit from such activities, which are funded by union dues. The Respondent refutes allegations that the agency fee funds union activities and argues that the Applicant has not substantiated this claim. It reiterates that the purpose of agency fees is to compel non-union members benefiting from CBAs to contribute to the cost of negotiation, avoiding free-riding.

105 In response to paragraph 40, the 5<sup>th</sup> Respondent asserts that Legal Notice No. 19 directs deductions from unionisable employees not in a union but covered by a registered CBA. Addressing paragraph 41, it defends the legality of agency fee deductions under section 49 of the LRA, emphasizing that these fees fund collective bargaining activities rather than unrelated political or ideological pursuits. The Applicant's claim that agency fees fund union activities lacks evidence. Regarding paragraph 42, the 5<sup>th</sup> Respondent highlights that its constitution governs members only and that agency fees are distinct from union dues. The National Executive Board budgets and approves union activities.

106 The 5<sup>th</sup> Respondent disputes the Applicant's characterization of agency fees in paragraph 43, reaffirming their distinct nature from union dues as provided under the LRA. It argues that failing to deduct agency fees would encourage members to withdraw from unions while still benefiting from CBAs, leading to discrimination. It contends that courts are not the forum to amend statutory provisions, which is the legislature's role, and that section 49 of the LRA clearly reflects Parliament's intention. The 5<sup>th</sup> Respondent challenges the Applicant's claims in paragraph 44, reiterating that agency fees do not confer union membership and ensure non-members contribute without compelling union affiliation.

107 In response to paragraph 45, the 5<sup>th</sup> Respondent states that employees benefiting from CBAs are obligated to pay agency fees without consultation. Regarding paragraph 46, the Applicant is put to strict proof regarding membership figures and assertions that the 5<sup>th</sup> Respondent lacks majority representation. The 5<sup>th</sup> Respondent denies the accuracy of the Applicant's figures, labelling them as speculative and unsubstantiated. It emphasizes that the burden of proof

remains with the Applicant, who has failed to provide credible evidence or authenticate the alleged statistics.

108 The 5<sup>th</sup> Respondent contends that it has a simple majority of unionisable employees in the civil service and has, on this basis, negotiated several Recognition Agreements and Collective Bargaining Agreements (CBAs) on behalf of its members. It asserts that the Applicant/Petitioner misunderstands the purpose of agency fees under Section 49 of the Labour Relations Act (LRA). The deduction of agency fees does not compel employees to associate with trade unions nor infringe upon their rights to freedom of association as guaranteed under Article 41 of the Constitution of Kenya, 2010, and Section 4 of the Labour Relations Act. The 5<sup>th</sup> Respondent argues that agency fees are not an interference with the freedom of association but rather a charge for benefits obtained by non-members who enjoy the terms negotiated in CBAs by the union. It contends that Section 49 of the LRA anticipates situations where an employee benefits from a CBA negotiated by a union they do not wish to join, and hence provides for union dues for members and agency

fees for non-members, ensuring fairness to both unions and employees.

109 The 5<sup>th</sup> Respondent denies the contents of paragraph 47 of the Supporting Affidavit, reiterating its representation of unionisable employees through valid agreements and CBAs. In response to paragraph 48, it emphasizes that it is a trade union recognized under Section 54 of the LRA and has the authority to negotiate on behalf of unionisable employees. The Respondent asserts that it would be unfair, unlawful, and discriminatory to allow non-members to benefit from CBAs without contributing via agency fees, as this would result in free-riding at the expense of members.

110 The 5<sup>th</sup> Respondent disputes paragraphs 49 and 51 of the Supporting Affidavit, asserting that legislative issues are the prerogative of Parliament under the doctrine of separation of powers. In response to paragraphs 52 and 53, it contends that union dues and agency fees are distinct and lawful payments under the LRA, made by members of recognized unions and non-members benefiting from CBAs, respectively. It emphasizes that these charges do not violate constitutional

rights or statutory provisions, including the Labour Institutions Act, Labour Relations Act, and Occupational Safety and Health Act.

111 The 5<sup>th</sup> Respondent further argues that Section 49(1) of the Labour Relations Act mandates the deduction and remittance of agency fees by the 3<sup>rd</sup> Respondent under the authority of the Cabinet Secretary for Labour and Social Protection, as provided in Legal Notice No. 19 issued on 26<sup>th</sup> January 2022. It asserts that the relevant authorities are acting within their statutory mandates, and unless the law is amended, the Applicant/Petitioner cannot seek to prevent them from exercising their functions.

112 Finally, the 5<sup>th</sup> Respondent maintains that all employees of the 3<sup>rd</sup> Respondent continue to benefit from terms negotiated by the 5<sup>th</sup> Respondent and must contribute their fair share of representation through agency fees. It concludes that the suit lacks merit and should be dismissed with costs borne by the Applicant/Petitioner. This deposition is stated to be true to the best of the deponent's knowledge and belief.

## **The 5<sup>th</sup> Respondent's Written Submissions**

113 The 5<sup>th</sup> Respondent filed written submissions dated 29<sup>th</sup> December 2023 in response to the Petitioner's application dated 17<sup>th</sup> March 2023. The 5<sup>th</sup> Respondent, a trade union mandated to represent employees within the National and County Governments of Kenya on matters relating to their terms and conditions of employment, highlighted its role in improving employer-employee relations and negotiating better terms for union members and other unionisable employees. It emphasized that under Section 49 of the Labour Relations Act, a trade union that has concluded a collective bargaining agreement (CBA) can request the Minister to issue an order requiring employers to deduct agency fees from non-members who benefit from the CBA. Pursuant to this provision, the 5<sup>th</sup> Respondent obtained an order under Legal Notice No. 19 for the deduction of agency fees from unionisable employees benefitting from its negotiated CBA.

114 The 5<sup>th</sup> Respondent noted that the application to effect these deductions followed lawful procedures and that the deductions were directed to the 3<sup>rd</sup> Respondent, who was a

signatory to the CBA. The 5<sup>th</sup> Respondent argued that the Petitioner had failed to demonstrate a prima facie case with a likelihood of success or how refusal to grant conservatory orders would violate constitutional rights. Relying on **Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another [2016] eKLR**, the Respondent outlined the principles for granting conservatory orders: demonstration of a prima facie case, the threat of irreparable harm, and consideration of public interest. **In Center for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 others (2017) eKLR**, the court emphasized that conservatory orders should prevent the violation of rights and preserve the subject matter of the petition.

115 The 5<sup>th</sup> Respondent further submitted that agency fee deductions are lawful under Section 49 of the Labour Relations Act and do not infringe constitutional rights under Articles 29 and 41 of the Constitution. The deductions are a statutory requirement ensuring fairness, as unionisable employees who benefit from negotiated CBAs contribute to the costs incurred by the union. **Citing Kenya Aviation**

**Workers Union v Bollore Africa Logistics – Kenya & another [2016] eKLR**, the 5<sup>th</sup> Respondent argued that gazetted agency fee orders have the force of law, and their implementation does not violate constitutional rights.

116 The 5<sup>th</sup> Respondent also addressed the request for injunctive orders, referring to the principles in **Giella v Cassman Brown & Co. Ltd [1973] EA 360**, which require a prima facie case, evidence of irreparable injury, and consideration of the balance of convenience. It submitted that the Petitioner failed to demonstrate the existence of any right that had been infringed or how irreparable harm would result from the deductions. Relying on **Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] eKLR**, the Respondent reiterated that a prima facie case requires evidence of a right being infringed to warrant an explanation from the opposing party.

117 The 5<sup>th</sup> Respondent also addressed concerns of discrimination under Article 27 of the Constitution. It argued that subjecting non-members benefitting from CBAs to agency fees is necessary to avoid inequality, as union members bear the cost

of negotiating these agreements. It cited **Tailors & Textiles Workers Union v New Wide Garments Kenya (EPZ) Limited [2013] eKLR**, which recognized that non-members benefiting from union-negotiated terms should contribute to the costs to ensure fairness and industrial peace. The Respondent concluded that existing agreements like the CBA must be enforced to maintain fair labour relations and that the deductions do not violate any constitutional rights but rather uphold the principles of equity and industrial harmony.

118 The 5<sup>th</sup> Respondent further submitted that this Court should be guided by the principle outlined in the US Supreme Court decision in **Communication Workers of America v Beck, 487 U.S. 735 (1988)**, quoted in the case of **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR**. The principle underscores that those enjoying the benefits of union representation should contribute their fair share to the costs of securing those benefits. The Respondent argued that the purpose of agency fees is to ensure non-union members benefiting from a union-negotiated collective bargaining agreement (CBA) contribute to the costs of such negotiations. They relied on Section 49 of

the Labour Relations Act, which provides for the deduction of agency fees from unionisable employees covered by a CBA, as directed by the Minister under Section 49(3) of the Act. The 5<sup>th</sup> Respondent emphasized that this provision is lawful and cited **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR**, where the Court held that agency fees do not interfere with freedom of association, as employees paying agency fees are not prohibited from joining any union of their choice.

119 The 5<sup>th</sup> Respondent also referred to **Kenya Union of Journalists & Allied Workers v Nation Media Group Limited & Another, Cause No. 799 of 2010**, to assert that agency fee deductions are lawful where unionisable employees benefit from a CBA. The deductions ensure equitable sharing of benefits and uphold trade union security and labour management, as confirmed by the registration of the CBA in RCA No. 384 of 2017. They argued that the Applicant had not demonstrated a prima facie case, as Gazette Notice No. 19 was lawfully issued.

120 On irreparable harm, the 5<sup>th</sup> Respondent cited **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR**, where irreparable harm was described as damage that cannot be quantified in monetary terms or cured. They argued that the deductions of agency fees from salaries are quantifiable and compensable, and the Applicant failed to show that the 5<sup>th</sup> Respondent could not refund the deductions if the Court found them unlawful. Consequently, the Applicant had not proved irreparable harm.

121 Regarding the balance of convenience, the 5<sup>th</sup> Respondent submitted that it favoured the Respondent, as Section 49 of the Labour Relations Act entitles unions to agency fee deductions from unionisable staff who benefit from a CBA. They argued that the Applicant did not dispute the existence of a valid CBA or the benefits unionisable employees continue to enjoy under it.

122 On the issue of transferring the matter to the Chief Justice for the constitution of a bench, the 5<sup>th</sup> Respondent referred to Article 165(4) of the Constitution and the decisions in **Community Advocacy and Awareness Trust & Others v**

**Attorney General, Petition No. 243 of 2011**, and **Peter Gichira v The Attorney General & Others, Petition No. 313 of 2015**. They argued that a matter must raise a substantial question of law to warrant a bench, which is an exceptional measure. They further relied on **Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, where a substantial question of law was defined as one of general public importance, affecting parties' rights significantly, and not settled by higher courts. The Respondent contended that the issues raised in this Petition are not novel, weighty, or complex and have been previously determined by the Employment and Labour Relations Court.

123 In conclusion, the 5<sup>th</sup> Respondent argued that the deduction of agency fees under Section 49 of the Labour Relations Act does not violate any constitutional rights and is a legal requirement to actualize the provisions of the law. They cited **Kenya Aviation Workers Union v Bollore Africa Logistics – Kenya & Another [2016] eKLR** and **Kenya Hotels and Allied Workers Union v Attorney General & 6 Others [2015] eKLR** to assert that such deductions are lawful and ensure fair distribution of the costs of union

representation. They urged the Court to dismiss the Application with costs to the 5<sup>th</sup> Respondent.

124 I have examined all the averments and submissions of the parties herein. I have set out the following as the issues this court will determine.

- 1. Whether the petitioner has locus standi to institute this petition.***
- 2. Whether this court has jurisdiction to handle this petition***
- 3. Whether labour officer, dosh officers and other civil servants and government officers performing statutory and quasi judicial functions under the labour relations act should be subjected to deduction of agency fees.***
- 4. Whether the minority trade unions have constitutional and statutory mandate to represent employees as union officials.***
- 5. Whether section 49 of the Labour Relations Act 2007 offends the rights of non union members who***

*are forced to pay agency fees yet are also on management cadre being in JG "P" and below.*

*6. Whether operation of section 4A of Labour Relations Act 2007 should be suspended until amended or until rules are in place.*

*7. Whether courts should impose provision in collective agreements of the parties.*

*8. Whether the respondents and interested parties have breached the Constitution as submitted by the petitioner.*

### **Determination.**

#### 125 **Issue No 1 Locus**

The respondents submitted that the petitioner has no locus to file this petition. In answer to this submissions I refer to article 22(1) and (2) of the Constitution of Kenya 2010 which states as follows:

**“ Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

By virtue of this position in the law, no one and no institution or body can be faulted for filing a petition alleging infringement of rights. The petitioner herein falls in this category of any person and I therefore find that the submission that the petitioner lacks locus to file this petition cannot stand.

126 **Issue No 2 Jurisdiction of the court**

The 2<sup>nd</sup>, 3<sup>rd</sup> and 3<sup>rd</sup> respondents and 3<sup>rd</sup> IPs also submitted that this court has no jurisdiction to handle this petition averring that the High court is the only court that has jurisdiction to address constitutional issues under article 165(3) (d)(i) of the Constitution.

127 They pointed out that the proper remedy for any alleged irregularity in the issuance of the legal notice lay with

administrative and statutory review mechanisms rather than constitutional litigation.

128 In answering this submission, I refer to article 162(2) and (3) of the constitution of Kenya 2010 which establishes the ELRC with its attendant jurisdiction as follows:

- 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)**

129 Indeed the ELRC was established under article 162(2) of the constitution and the jurisdiction granted is that of status of the High Court. In **Petition No 170 of 2012 USIU vs AG (2012) eKLR and Others** the court resolved the issue of this court's jurisdiction by stating that:

**The industrial court (read ELRC) is a specialised court to deal with employment and labour relations matters., by virtue of article 162(3) section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that**

**court. Since the court is of the status of the high court it must have the jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within exclusive domain.....**

130 The position of this court's jurisdiction has further been reinforced by the Supreme Court of Kenya in Supreme Court of Kenya **Petition No E004 of 2023** which held that the ELRC has jurisdiction to determine the constitutionality of a statute where the statute in question lies at the centre of an employer- employee dispute.

131 The petition herein lies within the purview of employees in public service vis a vis the Union of Civil Servants in relation to deduction of union dues.

132 It is my finding that this court is indeed endowed with jurisdiction to handle the petition and the submission that this court has no jurisdiction to handle this petition is found without merit and is dismissed.

**Issue No 3 whether the officers employed in JG "P" and below should be subjected to deductions of agency fees.**

- 133 The petitioner submitted that labour officers, Dosh officers and other officers who perform quasi judicial and statutory functions under the labour relations act and other acts are tasked with functions to ensure tripartite cooperation among labour sector players. The petitioner submitted that such players must retain impartiality which would be compromised if they are members of trade union.
- 134 The petitioner submits that such officers should be excluded from being members of trade unions and that they should not be subjected to unilateral decisions by the 2<sup>nd</sup> respondent and the trade union.
- 135 The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and 3<sup>rd</sup> interested parties aver that the recognition agreement signed between the Union and the Government does not explicitly specify grades for union membership but prohibits management level staff from participating in industrial action or holding union leadership positions. They aver that offices on job group "N" while

designated as assistant directors perform technical work rather than policy making functions.

136 The petitioner avers that the duties of these government officers are compromised for their inability to join a trade union yet are condemned to pay agency fees in the same vein.

137 The duties of Labour Officers, Dosh Officers and other officers whose duties relate to tripartite duties, conciliations and inspections means that on one hand they interact with their employer and on the other hand the union which is supposed to represent them.

138 The tricky situation in this scenario is that as employees, when they are members of a union, they cannot at the same time carry out conciliation duties between their own union and the Government their employer. This situation indeed brings about a situation of conflict. It is therefore not safe and right for them to join the 5<sup>th</sup> respondent union. The insistent then that they pay agency fees for not joining the union, defeats

the same purpose for which they are not members of the 5<sup>th</sup> respondent.

139 It is therefore my finding that the impartiality of the officers i.e Labour Officers, Dosh officers and others who perform statutory duties under the Labour Relation Act and OSHA/WIBA can be compromised by virtues of being subjected to deduction of union dues.

#### **Issue No 4**

140 **Whether minority trade unions have a mandate to represent employees as union officials.**

In answering this question, I refer to article 41(2)(c) of the Constitution of Kenya 2010 which states as follows:

**“very worker has the right—  
(c) to form, join or participate in the activities and programmes of a trade union;”**

141 Article 41(4) of the same Constitution states as follows:-

**4) Every trade union and every employers’ organisation has the right—  
(a) to determine its own administration, programmes and activities;**

- (b) to organise; and**
- (c) to form and join a federation**

142 My understanding of the law is that the size of a union does not determine whether or not they can represent its members as union officials. To insist that minority trade unions don't have the mandate to represent their members is tantamount to breaching the right of an employee to join a union of their own choice.

### **Issue no 5**

143 **Whether section 49 of the labour relation act 2007 offends the rights of non union members who are forced to pay agency fees.**

Section 49(1) of the Labour Relations Act 2007 provides as follows:

**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**

144 The import of this section is that any trade union that has concluded a CBA with an employer may request the Minister to issue an order requiring any employer bound by the CBA to deduct an agency fee from the union sable employee covered by the CBA but who is not a member of the Union.

145 The petitioner has contended that the provision of this section is unconstitutional and illegal and compromises wages of employees who have agency fees deducted from their wages without prior notice.

146 The petitioners cited **Janus vs American Federation of State & Municipal Employees Council 31, et al (2018)** which held that non-members must be informed of agency fees deductions.

147 The petitioners also challenge the proportionality and reasonableness of charging agency fees at the same rate as

membership fees arguing that non-members benefit only from one objective of the trade union operations.

148 The respondents aver that deduction of agency fees is not unconstitutional or discriminatory as it is applied uniformly to all non-union employees. They aver that agency fees serves to enhance industrial relations by ensuring fair contributions towards union activities from all beneficiaries.

149 The 5<sup>th</sup> respondents cited **Kenya Aviation Workers Union Vs Bollore Africa logistics Kenya & Another (2016) eKLR** which argued that gazetted agency fees orders have the force of law and their implementation does not violate constitutional rights. They also cited **Communication Workers of America vs Beck 4878 US 735 (1988)** cited in **Kenya Hotels & Allied Workers Union vs AG & 6 Others (2015) eKLR** which affirmed the position that those enjoying the benefits of union representation should contribute their fair share to the costs of securing those benefits.

150 The importance of paying agency fees cannot be underscored. It is however important to note that section 49 of the Labour Relations Act is not couched in mandatory terms. This implies that there are situations when payment of agency fees cannot be enforced. This also means that the Minister may or may not issue a gazette notice ordering deduction of agency fees without considering certain pertinent issues.

151 I have explained above why certain cadres of employees cannot be forced to join a trade union even if they fall in the category of unionisable staff as well as paying agency fees where they chose not to join a union. The risk of compromise of their duties become real. It is therefore important that there be clear rules setting out boundaries and parameters of when agency fees is payable.

152 The law envisaged this position and that is why section 83 of the Labour Relations Act provides that rules for the better carrying out of the provisions of this Act should be enacted.

153 It is unfortunate that rules on agency fees have not been enacted and the Minister is left to decide when or when not to issue a gazette notice to ensure deduction of agency fees.

154 Whereas the importance of the deduction of agency fees cannot be wished away, it is important that rules be put in place as soon as possible to ensure smooth implementation of the provision of the Act.

155 The petitioners aver that legal notice No 19 of 6/2/2022 is illegal to the effect that it directed the 3<sup>rd</sup> respondent to deduct agency fees from unionisable employees in the Civil Service who are not members of the 5<sup>th</sup> respondent. They aver that a list of the members affected was not provided as provided for under section 49(2)(b) which states as follows:

**“ A request in accordance with sub section (1) shall supply a list of all employees prepared by the employer in respect of whom a deduction shall be made...”**

156 Indeed section 49(2)(b) is also couched in mandatory terms which the respondents failed to supply as directed from the said gazette notice.

157 It is therefore my finding that section 49 of the labour relations act does not offend the rights of non-union members who pay agency fees. This right should however be limited to the right cadre and should therefore only be enforced under rules made under section 83 of the Act.

158 In view of the fact that legal Notice No 19 of 6/2/2022 was made without adherence to the procedures under section 49 of the Labour Relations Act, I declare the same illegal and null and void and quash it accordingly.

### **Issue NO 6.**

159 The issue of suspension of section 49 of the Labour Relations Act has been addressed above by the finding of this Court that section 49 of the Labour Relations Act is not unconstitutional but can be applied with adherence to parameters to be set out under the rules made thereunder.

### **Issue NO 7**

160 The petitioner sought orders that recognition agreements should include exit clauses allowing for revocation of the said agreements where a union fails to maintain majority representation required under section 14 and 54 of the Labour Relations Act.

161 Under article 41 of the Constitution, the unions manage their own affairs. This is also true of the employer's organization and federations. For this Court to be called upon to impose provision in the collective agreements, the court will be descending into an arena which is not its own and therefore interfering with the rights of the parties to collective bargaining. In any case, there are already mechanisms provided under section 54(5) of the Labour Relations Act on how a recognition agreement should be revoked. The prayer then is untenable.

### **Issue NO 8**

162 After analysing the above issues, the question then is whether the respondents and the interested parties have breached the Constitution as submitted by the petitioner.

The petitioner submitted that there are various articles of the Constitution being Articles 27,28, 36 41 and 47 amongst others.

163 I have analysed above instances where action of the respondents would lead to constitutional breaches under articles 41 of the Constitution on fair labour practice including freedom of association. Indeed the breaches of freedom of association would also result in breach of the petitioner's rights of human dignity.

164 In terms of this petition, I do find certain constitutional breaches which I have addressed accordingly.

### **Conclusion**

165 Having found as above and in view of the prayers sought, I make the following findings and orders.

1. An order or declaration do issue confirming that Labour Officers, Occupational and Safety Officers, Registrars and any such officers performing duties in relation to enforcement of labour and employment are not to be

subjected to deduction of agency fees/membership of the 5<sup>th</sup> respondent without clear rules and regulations being made under the Labour Relations Act.

2. An order of injunction do issue to restrain/prohibit deduction of membership/agency fees from officers of the 2<sup>nd</sup> respondent performing statutory duties which require them to remain independent and impartial.
3. Legal notice no 19 published on 6/2/2022 is herein declared unconstitutional null and void and hereby revoked.
4. This being a petition affecting a wide range of employees and being of public interest each party will bear its own costs.

**Dated, Signed and Delivered virtually at Nairobi this 23<sup>rd</sup> day of January, 2025.**

**HELLEN WASILWA**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**HELLEN WASILWA**

**JUDGE**