



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 93/2013

(formerly Nrb 447/2011)

(Before Hon. Justice Hellen Wasilwa on 1st October, 2013)

KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURES AND ALLIED
WORKERS CLAIMANT

-VERSUS-

HIGHLANDS PAPER MILLS

LTD RESPONDENT

JUDGMENT

The claimants herein Kenya Union of Printing, Publishing, Paper Manufacturing and Allied Workers filed their memorandum of claim on 24.3.2011 against the respondents herein Highland Paper Mills Limited. The issue in dispute relate to provisions in the parties' Collective Bargaining Agreement in relation to general wage increase, house allowance, effective date of the Collective Bargaining Agreement, preamble to Collective Bargaining Agreement and minimum basic wages.

The parties herein have a valid recognition agreement signed in 1998 and has been operational since then to-date. The said agreement is marked Appendix No. 1 herein. Since the recognition agreement, the parties have negotiated and concluded many other Collective Bargaining Agreements (CBAs) the latest one having been in the year 2008 and registered in court on 12th September 2008 via Case No. 172 of 2008. The said Collective Bargaining Agreement expired on 31st July 2009. After the expiry of this Collective Bargaining Agreement, the parties attempted to negotiate a fresh CBA but it appears they hit a snag.

The Union reported a trade dispute to the Minister for Labour and Human Resource Development on 3rd December 2009 as provided for in Section 62(1) of the Labour Relations Act 2007 Laws of Kenya. The Eldoret labour officer was appointed to act as conciliator on 6.4.2010. The conciliator invited parties for a joint meeting on 2.9.2010 at 11 am at Nyayo House, Nairobi Provincial Labour Offices. The conciliation meeting took off as per the minutes thereof Appendix 6. The issues in dispute which were to be discussed were not agreed upon. The issues relate to:-

1. General wage increase
2. House allowances payable per month
3. Effective date of the Collective Bargaining Agreement
4. Preamble to the Collective Bargaining Agreement
5. Minimum basic wages.

The claimants moved to the Industrial Court after the disagreement and now seek court's declaration on the Clauses where they disagreed.

The respondent filed their statement of response and later on, an amended statement of response on 21.6.2012 through the firm of Shilenje & Co. Advocates. The respondents contend that issues in dispute in the CBA negotiation exceed the 5 listed by the claimants. They further aver that they have not declined to give meaningful offers to the Collective Bargaining Agreement because the respondent is in dire financial stress and is posting losses in their operations. They also aver that in the financial year 2012, they posted a loss of Ksh 8,922,512, and as at 31st March 2011, they had unpaid sundry creditors demanding Ksh 14,124,832.62/= and outstanding water and electricity costs of Ksh 3,148,769/=. The respondents further aver that this catastrophic financial predicament has befallen them due to increase in production costs and rise in labour costs. Also according to the respondents, they are technically insolvent according to the report dated 21st February 2012 presented by Mr. F. K. Nganga of the Central Planning and Monitoring Unit of the Ministry of Labour.

The respondents submit that they are also facing numerous suits in court and other threats to legal action from the occupational safety and health Department if improvements are not made to their work place. They also contend that they have outstanding municipal council rates of Ksh 397,603 and have been served with a municipal council order to carry out immediate improvement to the factory estimated to cost over Ksh 3 million. It is the respondents contention that any attempt to incur further expenses can only be suicidal to the company and may lead to the collapse of the factory.

The respondents prayer therefore is to have this case dismissed according. Upon hearing the parties herein the issues for determination are as follows:-

1. To what extent the judicial process should interfere with collective bargaining.
2. Whether the court can order parties to include certain

clauses in the CBA as prayed for by the claimants.

Article 41(5) of the Constitution of Kenya 2010 provides that:-

“Every trade union, employer's organization and employer has the right to engage in collective bargaining.”

Under Section 57(1) of the Labour Relations Act 2007;

“An employer, group of employee or an employer's organization that has recognized a trade union in accordance with the provisions of the part, shall conclude a collective agreement with the recognized trade Union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.”

Under the Provisions of the Constitution and the Labour Relations Act 2007, it is actually the Union and the employer or employer's organization that negotiates the CBA.

Convention 98 Right to organize and Collective Bargaining Convention has been ratified by Kenya. An important principle covered by Convention 98 is the voluntariness of the negotiation process by the parties involved in the process. Article 4 of Convention 98 states that;

“Measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilization of machinery for voluntary negotiation between employer or employer's organization and worker's organization with a view to the regulation of terms and conditions of employment by means of collective agreements”

ILO Committee of Experts on Freedom of Association in its Digest of Decisions and Principles of the Freedom of Association 5th Edition paragraph 881 had this to say on this issue:-

“The right to bargain freely with employers with respect to conditions of work constitute an essential element in freedom of association and trade unions should have the right through collective bargaining or other lawful means to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict the right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers and employer's organizations should have the right to organize their activities and formulate their programmes.”

The need therefore to have free and voluntary negotiation is key to collective bargaining and the judicial process should only interfere where there is a stalemate. The general survey paragraph 304 had this to say on the issue of judicial process:- **“collecting bargaining as an instrument of social peace cannot be systematically and abusively be subjected to judicial scrutiny as to Constitutionality without losing it's credibility and usefulness.”**

In this case the claimants have sought court's intervention to have certain Clauses included in the CBA they want signed with the respondents. The respondents on the other hand have pleaded economic difficulty and submitted before this court various correspondences from their creditors and their statements of accounts to show that they are currently under economic strain. Indeed the reports from the Economic Planing Division of the Ministry of Labour also shows that they are technically insolvent. Without seeming to ignore this fact, this court is also guided by the General Survey of the Committee of Experts on CBA at paragraph 302 where the Committee had this to say:-

“Restructuring and privatization of enterprises. As emphasized by the Global Jobs Pact, in order to 'prevent a downward' spiral in Labour conditions and build the recovery, it is especially important to emphasize “the effective recognition of the right to collective bargaining” as an enabling mechanism for “productive social dialogue in times of increased social tension, in both the formal and informal economies”

The committee considers that the restructuring or privatization of an enterprise should not result automatically in the extinction of the obligations resulting from the collective agreement in force and that the parties should be able to take a decision on this subject and participate in such processes through collective bargaining.”

In this case then, the respondents cannot therefore plead economic difficulties and refuse to negotiate. The claimants have a stake in the sustainability of the respondent for the sake of their members and therefore in the negotiations, they ought also to be alive to that fact.

For reasons given above, this court is unable to force content into a CBA as it has to be the parties voluntary document. However this court can insist on negotiation between the parties. I therefore order the parties back to the negotiating table which they must do within 90 days from the date of this judgment.

HELLEN WASILWA

JUDGE

1.10.2013

Appearances

Wamboye for claimant present

CC. Doreen