Transport Workers Union Kenya v Etihad Airways Pjsc (Cause E229 of 2022) [2024] KEELRC 1768 (KLR) (8 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1768 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E229 OF 2022

JK GAKERI, J

JULY 8, 2024

BETWEEN

TRANSPORT WORKERS UNION KENYA ..... CLAIMANT

AND

ETIHAD AIRWAYS PJSC ..... RESPONDENT

JUDGMENT

1. The Claimant union commenced the instant suit by a Memorandum of Claim dated 11th April, 2022 alleging that the parties had failed to reach an agreement during joint negotiations of a CBA.
2. It is the Union's case that the parties could not agree on transport allowance, sick leave, severance pay and redundancy, house allowance, leave travelling allowance, termination of employment, salary increment and effective date.
3. The Claimant avers that employees of the Respondent have been members of the union and the parties have a recognition agreement.
4. That the Respondent had declined to sign the recognition agreement until the court intervened and it was signed on 2nd December, 2019.
5. It is the Claimant's case that when it forwarded a proposed Memorandum of Agreement (CBA) to the Respondent, it was unco-operative and the dispute was escalated to the Cabinet Secretary for Labour who appointed a Conciliator who prepared a report dated 8th September, 2022.
6. That the negotiations hit a dead end as the parties could not agree on seven areas including the effective date.
7. Finally, the Claimant avers that all other airlines in the same sector pay their employees better.
8. The Claimant prays for;

i. The court to find the Claimant's position to be merited and award accordingly as the Respondent had the wherewithal to pay.

Respondent's case

9. The Respondent avers that the parties had negotiated and agreed on 36 clauses of the draft CBA and only 8 were outstanding.

10. The Respondent avers that it is ready to pay a transport allowance of Kshs.5,000/= for employees in the lowest cadre and managerial Kshs.19,200/= and a leave travelling allowance of Kshs.15,000/=, 15 days sick leave on full pay and 15 days on half pay, that employees were members of the National Social Security Fund and contributions were remitted, 15 days severance pay, 2% salary increment on a one off basis, house allowance at Kshs.7,760/= for the lowest cadre and Kshs.51,680/= for the highest and the CBA ought to be effective on registration by the court.

Claimant's submissions

11. The union submits that the issue in dispute is CBA negotiations as opposed to the Recognition Agreement under Section 54 of the *Labour Relations Act*, 2007 as the parties have a Recognition agreement and CBA negotiations have been on-going since 2020.

12. In its submissions dated 16th April, 2024, the Claimant union urges that it stands with Ministry of Labour Report dated 9th February, 2023 as it is factual and urges the court to award the 8 clauses as prayed as the Respondent had submitted that the same would have no effect on the company as follows;

    1. Transport allowance Kshs.25,000/= per month.

    2. Leave travelling allowance Kshs.40,000/= annually.

    3. Sick leave entitlement 60 days with full pay.

    4. Termination – 30 per year.

    5. Redundancy and severance pay 1 month's salary as gratuity plus 30 days per year.

    6. Salary increment – 11% per year.

    7. House allowance – 10% increase.

    8. Effective date – 1st January, 2020.

Respondent's submissions

13. According to counsel, the Respondent has no unionisable employees in Kenya and the Recognition Agreement fails to meet the simple majority test under Section 54 of the *Labour Relations Act*, 2007 and due to be set aside.

14. On transport allowance, the Respondent urges that Kshs.5,000/= for the lowest and Kshs.19,200/= for the highest cadre was sufficient, leave travel allowance of Kshs.15,000/=, 15 days sick leave, employees are members of the NSSF, provisions of Section 40 of the *Employment Act*, 2007 on redundancy and severance pay of 15 days per year, a one off salary increment of 2%, house allowance at Kshs.7,760/= for the lowest cadre and Kshs.51,680/= for the highest and the CBA ought to take effect upon registration.

15. On commencement date, reliance was made on the decision in ELRCC No. E891 of 2022 Kenya Quarry & Mine Workers Union V Mineral Enterprises Ltd.

16. The Respondent urges the court to consider the circumstances of this case and find that the draft CBA cannot be concluded at this time as the Recognition Agreement is invalid by dint of Section 54 of the *Labour Relations Act*, 2007.

Analysis and determination

17. The issues for determination are;

    Whether;

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i. The Recognition Agreement between the parties is invalid.

ii. The court ought to intervene with the negotiations.

18. Concerning the validity or otherwise of the Recognition Agreement between the parties, it is common ground that parties have an existing Recognition Agreement on which collective bargaining negotiations was anchored. However, while the Claimant union asserts that the Recognition Agreement remains in force, the Respondent's counsel submits that it was invalid as the number of employees had fallen below the prescribed threshold. Although counsel for the Respondent submits that only 4 employees of the Respondent were members of the union, the Respondent did not furnish verifiable evidence to sustain the submission.

19. The Recognition Agreement was signed on 2nd December, 2019 and the Claimant union made CBA proposals on 6th December, 2019.

20. Section 54 of the *Labour Relations Act*, 2007 provides that an employer, group of employers or an employer's organization is obligated to recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees employed by the employer or group of employers.

21. Under Section 54(4), the Cabinet Secretary may, after consultations with the Board, publish a model recognition agreement.

22. Finally, under Section 54(5) of the Act;

    An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

23. A dispute relating to the cancellation of a recognition agreement may be referred to conciliation.

24. In the court's view, as neither party had sought cancellation or revocation of the recognition agreement, the same is still in force and binding on the parties.

25. As to whether the court ought to intervene, parties have adopted a common position that it should but award their proposals as urged in court and before the Conciliator.

26. According to the Conciliation Report dated 8th September, 2022, the Conciliator made recommendations on the six (6) contested clauses as follows;

    i. Redundancy and severance pay thirty (30) days for each year of service and no ex gratia payment.

    ii. Leave travelling allowance Kshs.20,000/= per year.

iii. House allowance.

Kshs.16,230/= for the lowest and current rate for the highest cadre.

iv. Termination of employment

Pension scheme by management or parties negotiate gratuity.

v. Salary increment

Matter be referred to the Central Planning Unit.

vi. Effective date

27. On its part, the Central Project Planning and Monitoring Department (CPPMD) proposed as follows;

i. Wage increase – none

ii. House allowance – Kshs.8,536/=

iii. Leave travelling allowance – none

iv. Redundancy – none

v. Termination of employment – none

vi. Effective date – none

28. From the documents on record, it is clear that the parties had agreed on all issues save for six (6). However, the Claimant union re-introduced transport allowance and sick leave which parties had already agreed.

29. As adverted to by the court in its Ruling delivered on 10th July, 2023, while the Respondent embraced several recommendations of the Conciliator, the Claimant union ignored the report altogether and re-introduced agreed issues such as transport allowance and sick leave.

30. As submitted by the Respondent's counsel, it is not the remit of courts of law to negotiate Collective Bargaining Agreements (CBA) or incorporate clauses in them.

31. A CBA is an instrument created by law to enable employers and trade unions negotiate and agree on terms and conditions of employees amicably.

32. This is patently discernible from the definition of collective agreement.

33. Section 2 of the *Labour Relations Act*, 2007 provides;

Collective agreement means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers.

34. Critical in the foregoing definition is the notion that a CBA as the name attests is an agreement to which the court is not privy. Only a trade union and an employer or group of employers or an organization of employers can enter into a CBA.

35. Indeed, Section 57(2) of the *Labour Relations Act* requires the employer to disclose to a trade union all relevant information for purposes of effective negotiations and confidentially of such information guaranteed by the provisions of Section 57(3) of the Act.

36. Under the *Labour Relations Act*, the role of the court is to register the Collective Agreement and ensure its observance by the parties.

37. The foregoing position is fortified by the Court of Appeal decision in Teachers Service Commission V Kenya National Union of Teachers & 3 others (2018) eKLR as follows;

> " The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union . . . If the labour court fixes basic salary in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law."

38. (See the sentiments of Otieno Odek JA).

39. In Amalgamated Union of Kenya Metals Workers V Kenya Vehicles Manufacturers Ltd (2018) eKLR, the court relied on the Court of Appeal decision and declined to settle the terms of the CBA.

40. However, in Kenya Tea Growers Association V Kenya Plantation & Agricultural Workers Union (2018) eKLR, the Court of Appeal expressed itself as follows;

> " However, the power to do so by the ELRC ought to be exercised judiciously and on a case by case basis where parties are unable to agree on the terms of a CBA. The court should ensure it does not substitute its preference with that of the parties' freedom to agree on the terms of employment."

41. Needless to belabour, the Court of Appeal acknowledged that court sparingly intervene where parties have failed to agree on the terms of the CBA but avoid substituting the desires of the parties with its own views.

42. From the evidence on record, it is discernible that although negotiation commenced in 2020, and progress has been made and the matter has been addressed through conciliation, the parties are yet to agree on various six (6) issues.

43. Puzzlingly, the Conciliator did not issue a certificate but merely papered an undated report and made certain recommendations which the parties do not appear to have interacted with in a forum together.

44. Relatedly, although the CPPMD Report dated 9th February, 2023 provided insights on the relevant parameters in the determination of wage disputes, the author made no proposal or recommendations in five (5) out of the six (6) contested issues which leaves the court unguided.

45. More significantly, the Respondent did not avail its financial statement to the CPPMD for purposes of preparation of the report.

46. Without financial statements, it was practically impossible for the CPPMD to assess the impact of the proposals by the Conciliator or the parties and make informed recommendations on any of the contested clauses.

General wage increase

47. While the Claimant union seeks a 10% increase per year, the Respondent maintains a 2% one off for the entire duration.

48. In Kenya Tea Growers Association V Kenya Plantation & Agricultural Workers Union (Supra), the Court of Appeal held thus;

> " Consequently, a court faced with a question of wage increment ought to take into account productivity, cost of living and the ability to pay by the employer."

49. In this case, the CPPMD Report is incomplete as the Respondent did not avail its financial statements citing UAE law. The statements were critical in determining whether the Respondent had the wherewithal to meet and sustain additional wage bill and no evidence of an expert was availed.

50. The Claimant's submission that the Respondent had the wherewithal had no supportive evidence.

51. Bearing in mind that the Consumer Price Indices (CPI) had risen to 21.78% from December 2019 and December 2022 coupled with the adverse impact of the COVID-19 Pandemic on businesses, the Respondent's proposal of an additional wage bill of Kshs.278,000/= for 2 years is in the court's view low while that of the Claimant union of Kshs.2,919,000/= is high.

52. In the circumstances, the court is not persuaded that it has a firm basis on which it could intervene on this clause. The parties hold the key to unlock the stalemate.

53. As regards house allowance, although the Conciliator recommended that the lower cadre of employees be paid Kshs.16,230/= as recommended by the Claimant union, the CPPMD Report recommended a minimum of Kshs.8,536/= after factoring in inflation (an increment of 10%).

54. The parties can narrow the gap and agree on this clause.

55. On leave travelling allowance, the Respondent made no offer but indicated that all employees are given an air ticket once a year. While the Claimant union proposed Kshs.45,000/= from Kshs.15,000/=, the Conciliator recommended Kshs.20,000/= which appears fair to both parties.

56. As regards redundancy, parties had agreed on one month's notice but could not agree on severance pay as the union proposed 30 days salary for each completed year of service and one month's salary ex gratia. The Respondent proposed 20 days salary per completed year and one month's notice.

57. The *Employment Act*, 2007 requires one month's notice and 15 days for every completed year of service.

58. In the circumstances, the court is persuaded that the disagreement is nominal and the parties ought to agree on the number of days failing which the provisions of the *Employment Act* apply.

Gratuity

59. While the employer argues that its employees are members of the National Social Security Fund (NSSF), the union proposes a pension scheme or service pay at 20 days for each year of service.

60. The Conciliator recommended the establishment of a pension scheme or that the parties negotiate gratuity.

61. As parties failed to agree on this issue, the court is persuaded that the establishment of a defined contribution pension plan is a viable option.

62. As regards effective date, the Conciliator reported that the parties had agreed that January 2022 be the effective date of the CBA.

63. In court, while the Claimant union cites 1st December, 2017, the Respondent cited 1st February, 2022.

64. Parties to agree on the effective date of the CBA.

65. Flowing from the foregoing, it is decipherable that the Claimant union has not laid a sustainable basis for the court's intervention in the negotiations between the parties.

66. Finally and most significantly, the Conciliator did not issue a Certificate of unresolved dispute to pave way for the court's intervention which is not guaranteed in respect of contested clauses of a CBA.

67. Finally, the orders that commend themselves are as follows;

a. Parties to re-negotiate the draft CBA, agree on the contested issues and lodge the same with the Cabinet Secretary for purposes of registration within 60 days.

b. Parties shall bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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 ***Civil 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.

DR. JACOB GAKERI

JUDGE