Barlays Bank of Kenya Limited v Banking Insurance and Finance Union (Civil Appeal E013 of 2022) [2025] KECA 253 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 253 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E013 OF 2022

P NYAMWEYA, LA ACHODE & WK KORIR, JJA

FEBRUARY 21, 2025

BETWEEN

BARLAYS BANK OF KENYA LIMITED ..... APPELLANT

AND

BANKING INSURANCE AND FINANCE UNION ..... RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) delivered on 26th July 2019 in ELRC Cause No. 1597 of 2015)

JUDGMENT

1. This appeal raises six grounds upon which the appellant, Barclays Bank of Kenya Ltd, expresses its dissatisfaction with the judgment of the Employment and Labour Relations Court (Abuodha, J.) delivered on 26th July 2019 in Nairobi ELRC Cause No. 1597 of 2015. Essentially, the dissatisfaction by the appellant revolves around the determination by the trial court in favour of the respondent, Banking Insurance and Finance Union, that a voluntary early retirement scheme is not an independent contract from the employment contract between the parties, and that former employees would benefit from a collective bargaining agreement signed after they exited service but covering the period when they were still in service.

2. There was no dispute between the parties that the grievants who were members of the respondent union, were employees of the appellant. In a circular dated 11th March 2013, the appellant informed its employees of its intention to undertake an organizational restructuring, inviting willing employees to apply for voluntary exit from service. At the same time, there were ongoing negotiations between the respondent and the Kenya Bankers Association, to which the appellant was a member, for a new collective bargaining agreement for the period 1st March 2013 to 28th February 2015. The grievants submitted their requests to be considered for the voluntary exit scheme, which was approved on 26th March 2013, leading to their official exit on the terms contained therein. On 19th August 2013, the

respondent and the Kenya Bankers Association entered into a collective bargaining agreement for 2013-2015, with the effective date backdated to 1st March 2013.

3. Before the trial court, the respondent's case emanating from the above set of facts was that the appellant coerced the grievants into registering for the voluntary exit scheme as they intended to terminate the employment of unionisable employees who were perceived to be earning humongous salaries. They claimed that the grievants were entitled to benefit from the terms of service in the new collective bargaining agreement, whose effective date was 1st March 2013. On the other hand, the appellant denied ever targeting the high-earning employees and asserted that the voluntary exit scheme was not forced on the grievants but instead, they entered into it willingly. The appellant maintained that the grievants were paid all their full benefits at the time of exit as per the terms of the voluntary exit scheme and the collective bargaining agreement that was in force then.

4. During the hearing before the trial court, each party called one witness. The witnesses concurred on the sequence of events leading to the grievants' exit under the voluntary exit scheme, as we have highlighted above. Additionally, the witnesses confirmed, as did the exhibits, that despite the new collective bargaining agreement being assented to in September 2013, the implementation period was backdated to 1st March 2013. In its judgment, the trial court found the claim by the respondent merited. The learned Judge noted that the appellant had not justified why they treated the grievants differently, yet they were in service as of 1st March 2013, when the new collective bargaining agreement was to take effect.

5. At the hearing of this appeal, learned counsel Mr. Onyony appeared for the respondent, while there was no appearance for the appellant. However, the firm of Oraro & Co. Advocates had filed written submissions dated 23rd September 2022, urging the appellant's case. Mr. Onyony had also filed his written submissions opposing the appeal, which he relied accompanied by brief oral highlights.

6. Through the filed submissions, counsel for the appellant submitted that the exit program was a binding contract between the appellant and the grievants and was voluntarily entered into by both parties. In urging this submission, counsel referred to the case of William Barasa Obutiti vs. Mumias Sugar Co. Ltd [2006] eKLR and National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR to highlight the principle that parties to a contract are often at liberty to enter into contracts outside the instruments governing employment relationship. Counsel also submitted that the respondent did not adduce evidence to show that the grievants had legitimate expectations of future adjustments of the terms of the voluntary exit scheme to align with the new collective bargain agreement. Counsel relied on the case of State of Punjab & Others vs. Dhanjit Singh Sandhu Civil Appeal No. 5698-5699 of 2009 to urge that parties were barred from doublespeak when it comes to the terms of the contract. Counsel reiterated the view that employment contracts are governed by the general law of contract thus the rules of interpretation of contracts apply. In this regard, counsel referred to the cases of Krystalline Salt Ltd vs. Kwekwe Mwakele & 67 Others [2007] eKLR and Damondar Jihabhai & Co. Ltd & Another vs. Eustace Sisal Estates Ltd [1967] EA 153. Counsel also referred to the case of Kenya Airways Ltd vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR to point out that courts must limit their interpretation of contracts and enforce only the obligations agreed upon by the parties. Counsel for the appellant held the view and submitted that the terms of the voluntary exit scheme were explicit and unambiguous and entered into before the new collective bargaining agreement could take effect, hence, the terms therein were binding.

7. Turning to the question of whether the terms of the 2013-2015 collective bargaining agreement could be implemented retrospectively, counsel referred to section 59 of the *Labour Relations Act* to submit that the grievants were not in employment when the collective bargaining agreement was signed and,

therefore, they were barred from benefiting from it. Reliance was placed on Charles M. Oroba & 23 others vs. Kenya Tea Development Agency Ltd [2019] eKLR and Patrick Ouma Owino vs. Paper Converters Ltd [2015] eKLR to buttress this submission. Consequently, counsel urged that we allow the appeal as prayed.

8. Mr. Onyony for the respondent relied on submissions dated 1st December 2022. According to counsel, the impugned judgment was proper and should be upheld. Counsel proceeded to submit that by dint of section 59(3) of the *Labour Relations Act* the provisions of the 2013-2025 collective bargaining agreement were binding upon the parties and the grievants were entitled to benefit from its terms. Counsel revisited the evidence on record and referred to the various circulars to bolster this view. Counsel further relied on Development Finance Company of Kenya Ltd & 2 Others vs. Wino Industries Ltd [1995] eKLR and Kenya Union of Entertainment & 2 Others vs Film Corporation of Kenya [2019] eKLR to urge that the grievants had a legitimate expectation that they will benefit from the collective bargaining agreement whose commencement date was 1st March 2013. Mr. Onyony also referred to sections 59 (2), (3), and (5) of the *Labour Relations Act* to submit that under the said provisions, the grievants qualified to enjoy the benefits of the collective bargaining agreement, because they were members of the union as of the date of commencement of the collective bargaining agreement. Referring to Article 41(2) of *the Constitution*, counsel urged that the grievants were entitled to fair labour practices, which included the right to be treated equally with the other union members. Counsel relied on the case of Housing Company of East Africa Ltd vs. Board of Trustees National Social Security Fund & 2 Others [2018] eKLR to bolster the foregoing submissions. Counsel also urged us not to consider the validity of the voluntary exit program and the reliance on circulars urging that the issues were never raised before the trial court and, therefore, amounted to new points on appeal. In conclusion, Mr. Onyony urged us to dismiss the appeal and uphold the findings of the trial court.

9. This being a first appeal, our role is akin to a retrial. As was elaborated in Selle vs. Associated Motor Boat Co. [1968] EA 123, we will reconsider the evidence, evaluate it and draw our own conclusions. We also find the dictum in Makube vs. Nyamuro [1983] eKLR cited by the appellant relevant in discharging our mandate. In that case, the Court warned thus:

> " However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

10. The foregoing are the ground rules upon which we will discharge our mandate in this appeal. Having read the record of appeal and the submissions by counsel, the singular issue that arises in this appeal is whether the respondent's members ought to have benefited from the 2013-2015 collective bargaining agreement.

11. From the evidence on record, there is no dispute that the grievants and the appellant were in an employee and employer relationship prior to 31st March 2013. In an internal memo referenced HRD 09/2013 dated 12th March 2013, the appellant invited willing employees to take part in a voluntary exit scheme, which, according to a letter dated 11th March 2013, was necessitated by the impending restructuring of the appellant's business model. We reproduce the terms and conditions of the scheme as per the circular as follows:

> " * One (1) month's consolidated pay in lieu of notice.
>
> * Exit pay @ one and a half months' consolidated pay for every completed year of service subject to a) minimum 6 months b) Maximum of 24 months provided the package is

not lower than the statutory requirements. Additional pay over and above the statutory provisions is paid out ex-gratia at management discretion.

Medical entitlement will be continued up to 31 December 2013 on the existing terms and conditions of the medical scheme applicable to you at the date of leaving service.

Loans - two options are available for repayment of personal and house loans; immediate full repayment of personal and house loans will attract a 25% discount. Fully secured loans (with tangible security) can continue at staff preferential rate with no discount until full repayment is made on outstanding balance. Unsecured loans must be paid in full or secured (with tangible security) to continue enjoying preferential rate. Any outstanding unsecured loans will move to commercial rates. Payment of accrued leave days where leave days have been carried forward within policy.

* Pension dues will be paid in accordance with the pension trust deed and rules.

Points to note

* Those leaving under this scheme will be subject to all terms and conditions of service as stated in their appointment letters.

* Payment of tax will be the responsibility of the Individual member of staff in accordance with the *Income Tax Act*."

12. The grievants heeded the call and their applications were accepted with the date of exit from the appellant's employment being 31st March 2013. On 19th August 2013, the Kenya Bankers Association and the Respondent formalized the 2013-2015 collective bargaining agreement which was to run from 1st March 2013 to 28th February 2015. The signing and registration of the collective bargaining agreement was communicated to the staff in the appellant's employment vide an internal memo HRD 23/2013 dated 15th September 2013 wherein the appellant indicated that the agreement would be implemented as follows:

> "The award as incorporated in the CBA applies to unionisable employees who were in employment as at 1st March 2013 and to any persons subsequently employed.
>
> All contract staff in unionisable grades.
>
> Where an employee was unionisable and was promoted to a managerial position in the course of the period, the arrears will be paid but restricted to the period preceding his/her promotion. The promotion salary will not be revised."

13. The internal memo HRD 23/2013 is informed by the provisions of Article A2 of the 2013-2015 collective bargaining agreement which provided for the duration of the agreement as follows:

> "The duration of this Agreement shall be for a period of twenty-four (24) months commencing on 1st March, 2013 provided that at any time after 30th November, 2014 either party may give to the other at least three (3) months' notice in writing of its desire for this Agreement to continue in force for a further period to be agreed upon, or of its intention to terminate the Agreement or alter any clause in the Agreement. In the later event, parties will enter into negotiations on the terms and conditions of a new Agreement and until such time as this is finalised the present Agreement shall continue in force."

14. Having laid down the foregoing foundation, there is no doubt that whereas the collective bargaining agreement took effect as from 1st March 2013, the same was assented to on 19th August 2013 and

registered after the grievants had left service of the appellant. In Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] KECA 404 (KLR) the Court (per E. M. Githinji, J.A) ring-fenced the realm of employment relations as follows:

> " The law in Kenya is mainly governed by the EA, the LRA, the terms of individual contracts of service and CBA where applicable. The law is purely statutory and contractual. The LRA and EA are modern legislations. Although they predate *the Constitution*, they essentially embody the constitutional ideals of fair labour relations and industrial justice, respectively."

15. His Lordship proceeded to address the role of the courts in interpreting a contract between an employer and employee thus:

> " ...The function of the Industrial Court is limited to interpreting and enforcing only those obligations which the parties to employment relationship has agreed to assume.
>
> There is no legal obligation express or implied for the implication into the employment contact of terms that the parties have not agreed to be binding conditions for
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> the mere reason that the court considers it reasonable to do so."

16. In the memorandum of claim, the grievants alluded to being coerced into signing the voluntary exit scheme. However, the record reveals no evidence to support such a claim. Therefore, we are clear that the grievants willingly and voluntarily applied to be considered for the voluntary exit scheme. Perhaps they were motivated by the apprehension of an impending job loss due to restructuring, but even so, the same does not amount to coercion or intimidation. Having stated the foregoing, we wish to refer and associate ourselves with the holding in William Barasa Obutiti vs. Mumias Sugar Company Limited [2006] KECA 37 (KLR) regarding the freedom of parties to a contract. In that case, the Court stated that:

> " It is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement of mutual release may be subject to terms as in the VERS. In such circumstances, the agreement will be effective to override formal or substantial restrictions placed on the termination of the contract by the original contract itself. See Latchford Premier Cinema Ltd Vs. Ennion & Paterson [1931] 2 Ch.409."

17. Having expressed the applicable law, the singular issue before us that needs to be answered is whether the collective bargaining agreement that was signed after the exit of the grievants but covered the period when they were still in service applied to them.

In addressing this issue, the learned Judge succinctly held as follows:

> 12. According to the Claimant Union, the negotiations culminating in the signing of the CBA and its eventual registration started when the grievants were still in the respondent's employment hence they ought to benefit from it. The respondent held a contrary view.
>
> 13. The Human Resource circular dated 16th September, 2013 on the implementation of the 2013/2015 CBA states on the issue of eligibility that the CBA applied to unionisable employees who were in employment as at 1st March, 2013 and any persons subsequently employed.

14. The grievants exited the respondent's employment on 31st March, 2013 and this has been confirmed by the respondent. They were therefore in the respondent's employment on 1st March, 2013 the eligibility date cited in the Human Resource Circular referred to above.

15. Whereas it is the legal position that a CBA takes effect from the date of the registration nothing negates its validity merely because it is applied retrospectively by consent of the parties.

16. Clause A2 of the registered CBA in issue (Appendix 2 of Claimant's documents) provides for the duration of the CBA to be for a period of 24 months commencing from 1st March, 2013. It is therefore not in doubt that the parties to the CBA intended it to apply with effect from 1st March, 2013 which period the grievants were still in employment of the respondent.

17. Negotiations, conclusions and eventual registration of CBA may at times be a tedious process hence it is not uncommon for the negotiated terms to be implemented retrospectively...."

18. As correctly pointed out by the learned Judge, although the grievants had exited service by the time the collective bargaining agreement was signed, the commencement date of the agreement had been backdated to the period when the grievants were still in the service of the appellant. A proper and just interpretation of the contract between the parties would then lead to the logical conclusion that this collective bargaining agreement became part and parcel of the contract of service between the appellant and the grievants, and there is no way that the appellant can run away from its obligations under the agreement.

19. Whereas it is indeed correct, as submitted by counsel for the appellant, that parties to a voluntary exit scheme are bound by the terms of their agreement, nothing stops an employee who has exited service from benefitting from a backdated collective bargaining agreement. We find the facts of this appeal not dissimilar to those in *Simon P. Kamau vs. Teachers Service Commission, Nakuru HCCC No. 65 of 2006* where an issue arose as to what would be the "last salary" pursuant to section 10 of the *Pensions Act* of a teacher who had retired during the implementation of a collective bargaining agreement spread over a period of five years commencing 1st July 1997. In that case, the defendant, the Teachers Service Commission, had entered into a collective bargaining agreement on 11th October 1997 with the plaintiff's union, the Kenya National Union of Teachers (the union), through which the members of the union were awarded annual salary increment in five phases commencing 1st July 1997. The plaintiff retired in 1999 having received a single increment. He brought a class action against the defendant asserting that the teachers who had retired from 1st July 1997 were entitled to pension based on the full increment contained in the five phases. The defendant opposed the claim asserting that a retired teacher was only entitled to pension based on the last salary as indicated in his or her last pay slip. Maraga, J. (as he then was) agreed with the plaintiff holding that the pension of each teacher who had retired during the material period was to be calculated based on the increments in all the five phases. On appeal, this Court (differently constituted) in Teachers Service Commission vs Simon P. Kamau & 19 Others [2010] eKLR while upholding the judgment of the High Court held that:

> " The respondents are not claiming what they did not earn and therefore entitled to receive from the appellant. The collective agreement, referred to in this judgment, did individually form part of the contract of service of the respondents and those they represent, with their employer. Common sense demands this interpretation since any other view would not give

effect to the agreement between the parties and would not make sense. In this regard we would like to adopt the words of wisdom of Lord Goddard, CJ in the case of Barnes vs. Janvis [1953] I WLR 649 where he stated:-

> " A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered."
>
> ....
>
> In the circumstances, the invitation by Mr. Bosire, learned counsel, to disregard the agreement between the parties would give rise to injustice to the respondents. The meaning of the phrase "last salary" should include the effect of the agreement signed by the parties.
>
> We therefore hold that the last salary should be computed in a way that incorporates all the terms of the agreement between the parties. In the result, we uphold the superior court's judgment. The appeal is accordingly dismissed with costs to the respondents." [Emphasis ours]

20. The facts of the cited case, answers in the affirmative the question as to whether the backdated collective bargaining agreement applied to the grievants who had left employment at the time the agreement was signed. In the cited case, the agreement though signed on 11th October 1997 was to apply to "those on leave pending retirement or final termination of appointment on or after" 1st July 1997. In the appeal before us, the 2013-2015 collective bargaining agreement signed between the respondent and Kenya Bankers Association, of which the appellant was a member, applied "to unionisable employees who were in employment as at 1st March 2013 and to any persons subsequently employed." There is no dispute that the grievants were unionisable employees in the payroll of the appellant as at 1st March 2013. The finding of the learned Judge was therefore in tandem with the contract between the parties and the law. There is thus no merit in the appellant's appeal and the same is for dismissal.

21. The final issue relates to the costs of this appeal. Rule 33 of the Court of Appeal Rules, 2022 empowers this Court upon hearing an appeal to make any necessary incidental or consequential orders, including orders as to costs. In this appeal, nothing has been placed before us to justify our departing from the general rule that costs follow the event. We, therefore, award the costs to the respondent.

22. In conclusion, the appeal herein is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR