IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, VISRAM & G. B. M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 37 OF 2016

BETWEEN

MUKIRIA FARMERS CO-OPERATIVE SOCIETY LTD ..... APPELLANT

AND

1. **JACOB RUKARIA**
2. **MISHECK MWORIA**
3. **NAHASHON MUCIRA**
4. **VERONICA NKIROTE**
5. **PAUL GICHURU**
6. **REUBEN MUTWIRI)..... RESPONDENTS**

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nyeri (Byram Ongaya, J) dated 18th December, 2015

in

ELRC No. 69 of 2015)

****

JUDGMENT OF THE COURT

1. The appeal before us raises two main issues of law. Firstly, whether the terms of a Collective Bargaining Agreement (CBA), which is for a fixed term, between an employer and a trade union, continues to apply after expiry of the CBA. Secondly, whether existing labour laws were complied with by the employer before declaring its employees redundant.

2. The employer, who is the appellant before us, is **Mukiria Farmers Co- operative Society Ltd** (the Society). Before April 2015 the society was in the business of coffee production and had in its employment 34 different cadres of staff. The unionisable employees were members of the **Kenya Union of Commercial Food and Allied Workers** (the Union) and on the 15th April, 2009, the Union signed a

CBA with the society covering various terms of employment. Among those terms were ***'Retirement'*** under ***Clause 21*** and ***'Redundancy and Severance Pay'*** under ***Clause 22*** which provided, in relevant parts, as follows:

> ***"21. RETIREMENT***
>
> ***a. An employ may retire at the age of 55 yrs for Office and 50 yrs for manual workers on grounds of old age.***
>
> ***b. …….***
>
> ***B. ……***
>
> ***C. RETIREMENT BENEFITS.***
>
> ***In both compulsory and voluntary retirement, retirement benefits shall be paid as follows:***
>
> ***i. Provident Fund of lower category - 8%***
>
> ***Middle - 10%***
>
> ***Upper - 12%***
>
> ***ii. Two months salary for every year completed in service.***
>
> ***iii. ……***
>
> ***22. REDUNDANCY AND SEVERANCE PAY.***
>
> ***In the event of an established employee being declared redundant he/she shall be entitled to:-***
>
> ***A. Two months notice or one months salary in lieu thereof.***
>
> ***B. A severance pay calculated at the rate of one months salary for every year completed in service.***
>
> ***C. Payment of overtime and any other remuneration which may be due calculated up todate on which he/she seased work.***
>
> ***D. Pre-rate leave entitlement in accordance to days in that Society year.***
>
> ***F. In deciding which of the employee's should be declared redundant the "Principle" of last in first out shall apply subject to all other facts such as merit, ability and reliability being equal."***

3. ***Clause 27*** of the CBA provided for the ***'Effective Dates and Duration of Agreement'*** thus:-

> ***"The effective dates and duration of this agreement shall be a period of Two years from January 2009 to 31st December, 2010."***

4. It is common ground that the six respondents before us were among the unionisable employees of the society who worked as watchmen, machine operators and general workers and were classified as ***"manual workers"*** for purposes of the CBA. Four of them were born in 1963 and would therefore have been 47 years old by the time of expiry of the CBA; one was born in 1964 and would have been 46 while the youngest was born in 1974 and was therefore aged 41 years. They were all ineligible for retirement if the terms of the CBA applied.

5. About four years after the expiry of the CBA, in March 2015, the society experienced huge financial problems due to reduced coffee production by farmers who were uprooting their plants to give way to more lucrative urbanization, and also due to market downturn. It could not pay salaries to its workers for nine months. As a result, it resolved to reduce the workforce by declaring redundancy as part of the austerity measures. It called meetings with the workers and their union representatives to explain the problem and the intention to lay off 14 manual workers, among them the six respondents, five of whom had reached the age of 50. According to the society, all the employees and the union agreed to the plan and it proceeded to issue out redundancy letters to take effect from April 2015. It also paid out all lawful dues to the employees declared redundant.

6. The six respondents were, however, dissatisfied and appear to have been advised by the union to file a claim on their own asserting that the CBA was still alive and therefore, the five of them who had reached the retirement age of 50 years in 2015 ought to have been served with retirement letters, not redundancy, and enjoy better terminal benefits. All six also claimed that the redundancy procedure was flouted by the society, even if redundancy was applicable. They sought the following orders from the ***Employment and Labour Relations Court*** (ELRC):

> ***"1) The redundancy letters be declared null.***
>
> ***2) That the claimants be paid their benefits as per retirement clause in the CBA.***
>
> ***3) That the benefits be paid within 7 days from the date of the judgment.***
>
> ***4) The costs of the suit be provided for."***

7. After hearing the Branch Secretary of the Union, ***Mr. Stephen Bundi William*** (CW) who was the sole witness for the respondents, and the Secretary Manager, ***Mr. Edward Kinoti Mugambi*** (RW) who was the sole witness for the society, the trial court **(Byram Ongaya, J.)** found that the CBA was still applicable despite the sunset clause and therefore the retirement provisions rather than the redundancy provisions applied. The court reasoned as follows:-

> ***"It is the court's opinion that once the terms of the collective agreement are incorporated into the contract of employment of the individual employee covered by the collective agreement, such incorporation continues to apply even if the period of the collective agreement lapses. If an otherwise view were to prevail, that such incorporation lapses with the lapsing of the collective agreement, then both the employee and employer would be subjected to a vacuum in their employment relationship and which would be undesirable and absurd state of affairs. Indeed, the court finds that the law does not say that the incorporation of the terms of service from the collective agreement to the contract of service of every employee lapses when the collective agreement lapses. Thus to answer the 1st issue for determination the court returns that the provisions of the lapsed collective agreement having been incorporated into the claimants' individual terms of service, the redundancy as well as the retirement provisions in the collective agreement applied to the claimants."***

8. On the procedural propriety of redundancy, the court found for the respondents reasoning thus:-

> ***"The 2nd issue for determination is whether the redundancy procedure was followed. The respondent's witness (RW) testifies that some workers employed long after the claimants were in service were retained in service. The court finds that as submitted by the claimants, the principle of first in last out or consideration of seniority as is provided for in Section 40 of the Employment Act, 2007 was not adhered to. Further, the court holds that where the employee is to leave employment under two or more modes of separation and one provides for better or more advantageous separation benefits, the applicable principle is that the employee is deemed to be entitled and to elect the more advantageous option. In this case, retirement at age 50 offered better pay and terminal benefits than redundancy and to that extent, the redundancy was null."***

9. Orders then issued out, and were complied with, for payment of retirement benefits to the five respondents who had attained the age of 50 and an immediate reinstatement order with full pay for the one who was yet to attain retirement. Their costs assessed at Sh. 25,000 each were also paid. Despite compliance with the court orders, the society was aggrieved and came before us to challenge the findings.

10. The memorandum of appeal raises seven grounds but they were argued as five in oral submissions, basically addressing the two main issues summarized at the opening paragraph of this judgment. Learned counsel for the society **Mr. Mwenda Mwarania** referred us to ***Section 59 (3)*** of the ***Labour Relations Act*** (No.14 of 2007) **(LRA)** and strongly submitted that a CBA once signed and registered is incorporated into the individual contracts of employment. It followed that ***clause 27*** of the agreement which limited the term of the CBA was incorporated into the contract of employment and the CBA could only be binding in terms of ***Section 59 (1)*** *'for the period of the agreement'* which was two years ending in December 2010. Consequently, the CBA was not in force as at the time of redundancy in 2015.

11. As an alternative argument, counsel contended that even if the CBA was considered to have been in existence, it would have been unenforceable in view of Government Policy directives issued in March 2009, one month before the signing of the CBA. By those directives, the mandatory retirement age for public servants was changed from 55 to 60 years. The law, however, in ***Section 60 (6) (b)*** of **LRA** prohibits the court from registering any CBA which '*does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister'*. In counsel's view, the Minister's directive had the force of law which the agreement could not change and therefore the CBA was unenforceable *ab initio*, despite registration with the court.

12. As to the finding by the trial court that there would be a vacuum if the CBA was held to have lapsed before a fresh one is negotiated, counsel submitted that there would be none. Not every contract of employment is regulated by a CBA and in any event, he submitted, ***Section 61 of*** the LRA caters for ***'Terms and conditions of service in the public sector where there is no collective bargaining'.*** Counsel contended that the general law on employment continued to apply to the relationship between the parties the absence of a CBA notwithstanding.

13. On the issue of compliance with the law on redundancy, Mr. Mwarania submitted that the trial court merely considered whether the principle of *'First In Last Out'* (FILO) was complied with but failed to consider the general principle laid out in ***Section 40 (1) (c)*** of the ***Employment Act***. There was evidence on record, he submitted, to show that the society had good reasons for exempting two manual workers from redundancy owing to their special skills.

14. Finally, counsel attacked the order of reinstatement of one of the respondents without taking into consideration the dire financial straits the society was in, and the difficulties in maintaining an excessive work force. The order, in his view, would encourage a multiplicity of suits by other workers seeking the same relief and end up bankrupting the society.

15. For their part, the respondents, who were unrepresented by counsel, filed written submissions basically supporting the findings of the trial court. They submitted that after incorporation of the collective agreement into their contracts of employment there was no expiry date; that ***Section 59 (2) of LRA*** provides that the CBA would continue to be binding on all parties even after resignation and had no time limit; that the Minister's directives have no force of law, could not override the provisions of an Act of Parliament, and were not applicable to unionisable employees; that the two employees retained by the society had no special skills; and that in default of compliance with the law, the remedy of reinstatement was appropriate.

16. We have re*considered the evidence and evaluated it afresh in order to draw our own conclusions, as is our duty on a first appeal. We are, nevertheless, mindful that we did not see or hear any witnesses and should make due allowance in that respect. In the case of* ***Jabane vs Olenja*** ***[1986] KLR 661*** this court stated:-

"More recently, however, this Court has held that it will not lightly differ from the findings of

fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular <u>Ephantus Mwangi v Duncan Mwangi Wambugu</u> (1982-88) 1 KAR 278."

17. CBAs are instruments of social justice. They are tailored to promote a system of peaceful and routine bargaining that would eliminate industrial strife and violence, create industrial democracy and make capitalism work. They have a firm foundation, not only in statutory law but also in the ethos, standards and principles of the **International Labour Organization** (ILO) and our own ***Constitution 2010***. ***Article 41 (5)*** of the Constitution clearly states that ***'every trade union, employers' organization and employer has the right to engage in collective bargaining'***.

18. The relevant statutory provisions relating to bipartite CBAs between an employer and a trade union is the LRA enacted in 2007 to, *inter alia*:

'...promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes'.

It defines a collective agreement as:

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

19. The entire process of arriving at the agreement is entirely voluntary and is preceded by structured negotiations where the employer and the trade union make full disclosures of information and bargain in good faith, mutual trust and cooperation. The law makes the bargaining field fairly level. Once it is signed and registered by the court as the law requires, the terms of the CBA bind the parties and the employees on whose behalf it was bargained. The effect of the collective agreement, as relevant, is stated in ***Section 59*** of LRA as follows:-

"(1) A collective agreement <u>binds for the period of the agreement</u> -

<u>a. the parties to the agreement</u>;

b. all <u>unionisable employees</u> employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

c. …….

(2) <u>A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union</u> or employers' association.

(3) <u>The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement</u>.

(4) ……..

(5) A collective agreement <u>becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties</u>.

[Emphasis added]

20. As is evident from that section, a collective agreement is only binding on the employer, the trade

union and the unionisable employees ***'for the period of the agreement'***. The period of the agreement in the matter before us was for two years between January 2009 and December 2010. It was the period mutually agreed upon by the parties after structured negotiations guided by the law. The role of the court in that case, as in all contractual matters, would be to enforce the intentions of the parties otherwise it would do violence to time honoured legal principles.

21. It was possible for the parties to have framed the clause on 'duration' in a manner that made it clear that the CBA would continue to bind them after expiry but before negotiating another one. We have examined a large number of CBAs signed in Kenya after 2007 and, invariably, they all contain an effective date of commencement and duration of operation. Many of them make the intention of the parties clear when an expired CBA shall continue to operate before another one is signed. We may sample a few:-

> *"This agreement shall become effective from 1st October, 2010 and shall remain in force for 24 months from the date and thereafter shall continue to be in force until amended by mutual agreement".*
>
> .....
>
> *"This agreement shall be effective from 1st July 2011 and shall remain in force for a period of three years from that date. Thereafter it shall continue to be in force until both parties amend it".*
>
> .....
>
> *"This Agreement becomes effective from the 1st August 2012 and shall thereafter remain in force for a period of 24 months. After the expiry date, the Agreement shall continue in force until it is amended by mutual consent, provided that the party desiring to amend the agreement or any clauses in the Agreement shall give the other party at least four months' written notice setting out in details the desired amendments".*
>
> .....
>
> *"This agreement shall be effective from October 1, 2013 and shall remain in force until amended or terminated. Any party intending to amend or terminate this agreement shall give one month's written notice to the other party expressing such intention".*
>
> .....
>
> *"This agreement shall be effective from the 1st day of January 2014, and shall remain in force for a period of two (2) years from the date, and thereafter until it is amended by mutual agreement between the Company and the Union provided that the party desiring to amend the agreement shall give one month's notice of their intention and shall set out in details the amendments or alteration which such party desires."*

22. We have said enough to persuade ourselves that the CBA signed between the parties in this matter on 24th April, 2009 had a time limit of two years and there was no intention expressed to extend its operation after expiry. It had a sunrise date, 1st January, 2009, and a sunset date, 31st December, 2010. Like an employment contract which has a time limit, it expired without more on the sunset day. It is not clear why the union did not negotiate another CBA with the society. It is also surprising that the Union is not the party complaining of breach as it ought to have been. The terms of the CBA were incorporated in the contracts of employment of the respondents and other unionisable employees who may not have been members of the union and they too benefited for as long as the CBA lasted. On this issue we agree with the submissions of learned counsel for the appellant.

23. We do not, however, agree with the alternative argument advanced by counsel that the CBA was a

nullity in view of government circulars issued on the retirement age. In the first place, as correctly held by the trial court, the circulars were no substitute for the law. In the second place, ***Section 61***, LRA, appears to cover ***"the public sector where there is no collective bargaining".*** There was collective bargaining in this matter and the resultant CBA was lawfully registered with the court as by law required. There was no vacuum after expiry of the CBA as alluded to by the trial court. All workers continue to be protected under the Constitution and the employment and labour laws enacted by the legislature. In sum, the first ground of appeal succeeds.

24. Was the law on redundancy complied with? That is the second main issue of fact and law. The trial court found that the principle of 'First In Last Out' was violated and that in any event, the respondents were at liberty to choose the better of the options between retirement and redundancy. Having held as we have, that the CBA expired four years before the issue of redundancy arose, we think the choice between retirement and redundancy was rendered otiose. The relevant law to consider is ***Section 40*** of the ***Employment Act*** which sets out the procedure and principles on redundancy. It provides, in relevant parts:

> ***"40. Termination on account of redundancy***
>
> ***(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –***
>
> > ***(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
> >
> > ***(b) ……***
> >
> > ***(c) the employer has, in the section of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
> >
> > ***(d) ……..***
> >
> > ***(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
> >
> > ***(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
> >
> > ***(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***
>
> ***(2) ……..…..***
>
> ***(3) ……"***

25. The only provision considered by the trial court was ***Section 40 (1) (c)*** since there was evidence on record that the society had complied with the other relevant requirements of the Section. ***Sub-section (1) (c)***, however, is not limited to seniority or the principle of 'first in last out' only. In terms stated in the Section, seniority must be balanced with ***"...the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy".***

26. There was evidence from the witness for the society, (**RW),** that a selection process did indeed take place. The only complaint by the respondents was that one watchman who was employed later in time

and one machine operator similarly employed, were not declared redundant. The society explained in its evidence that the watchman had clerical skills and doubled up as a cherry picking clerk. The machine operator also had skills which enabled him to doubled up as a mechanic for general maintenance of the society's machinery. The respondents' witness, **(CW)**, did not counter that evidence, stating in cross examination that he had not shared the information with the respondents who had raised the issue in their statement of claim. He also did not have any skills inventory for the respondents to discredit the selection process made by the society. It is not apparent that such evidence was considered by the trial court. In those circumstances, in our view, the finding made on breach of ***Section 40 (1) (c)*** is without proper basis in fact and we so find. The appellant succeeds on the second issue.

27. The upshot is that this appeal is meritorious and we allow it. We set aside the orders made by the Employment and Labour Relations Court on 18th December, 2015 and substitute therefor an order dismissing the respondents' claim filed on 5th May, 2015. As the main issue in the claim and the appeal relates to the proper construction of a crucial instrument that is central to the entire employment industry and whose result may benefit the wider community, each party shall bear its own costs of this appeal and of the lower court.

Orders accordingly.

Dated and delivered at Nyeri this 7th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….……..

JUDGE OF APPEAL

G. B. M. KARIUKI

……..…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR