Kenya Chemical Workers Union v Vector Pest Control and Supplies Limited (Cause e808 of 2023) [2025] KEELRC 947 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 947 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E808 OF 2023

BOM MANANI, J

MARCH 27, 2025

BETWEEN

KENYA CHEMICAL WORKERS UNION ..... CLAIMANT

AND

VECTOR PEST CONTROL AND SUPPLIES LIMITED ..... RESPONDENT

JUDGMENT

Background

1. The dispute between the parties relates to implementation of a Collective Bargaining Agreement (CBA) that was signed between them in 2022. Whilst the Claimant accuses the Respondent of deliberate refusal to give life to the CBA, the Respondent pleads inability to implement it on account of fiscal constraints.

Claimant's Case

2. The Claimant avers that it is a trade union that is registered in the Republic of Kenya. It contends that it represents workers in the chemical and allied industries within the Republic.

3. The Claimant contends that it has members working for the Respondent. It further avers that the two have a subsisting Recognition Agreement which entitles them to enter into the collective bargaining process.

4. The Claimant contends that the parties entered into a CBA which they signed on 28th March 2022. It contends that the CBA was subsequently registered on 10th June 2022 thus gaining force of law.

5. The Claimant contends that despite the parties having concluded the CBA, the Respondent declined to implement it. As a result, it (the Claimant) reported a trade dispute to the Ministry of Labour and Social Services.

6. The Claimant contends that the Ministry appointed a conciliator to resolve the aforesaid trade dispute between the parties. However, the Respondent declined to cooperate with the said conciliator by failing to attend conciliation meetings. As a result, the conciliator was forced to issue a certificate of non-resolution of the dispute.

7. The Claimant has now approached the court to seek an order to compel the Respondent to implement the impugned CBA. As well, it (the Claimant) prays for costs of the case.

Respondent's Case

8. On its part, the Respondent does not deny that the parties have a subsisting Recognition Agreement. The Respondent also admits that the two entered into a CBA on 28th March 2022 and that the same was subsequently registered as contended by the Claimant.

9. However, the Respondent contends that it was unable to implement the monetary clauses in the CBA due to the dire fiscal constraints it has been facing. The Respondent contends that this was made worse by the effects of the Covid 19 pandemic.

10. The Respondent avers that the parties have held several meetings during which the Claimant was informed of its (the Respondent's) financial challenges. As such, the Claimant is aware that implementation of the CBA was frustrated by the difficult economic environment which the Respondent was operating in.

11. The Respondent contends that it is impossible to implement the impugned CBA in its current form. It avers that to compel it to give life to the CBA will be tantamount to forcing it to close down its operations.

Issues for Determination

12. After evaluating the pleadings and evidence on record, I find the following to be the issues that present for determination:-

    a. Whether the Respondent is bound to implement the impugned CBA.

    b. Whether the court should issue the orders sought by the Claimant.

Analysis

13. The process of collective bargaining in Kenya is guided by the *Labour Relations Act*, CAP 233 Laws of Kenya. By virtue of sections 54 and 57 of the Act, once an employer and a trade union enter into a Recognition Agreement, they are obligated to enter into the collective bargaining process in order to agree on terms and conditions of service for unionisable employees who fall within the jurisdictional reach of the trade union.

14. Once a trade union and an employer have concluded the collective bargaining process and entered into a CBA, they are required to submit it to the Employment and Labour Relations Court for registration (see section 60 of the Act). Upon registration of the CBA, it becomes binding on the parties to it for the duration of its efficacy. Further, the terms of the CBA are incorporated into the respective contracts of service of the employees the CBA is meant to benefit (see section 59 of the Act).

15. From the moment the CBA is registered, it becomes enforceable. And the parties to it are under obligation to implement it (see section 59(5) of the Act).

16. The evidence that was tendered by the parties demonstrates that the impugned CBA was processed in accordance with the law. Therefore, it became binding on them and is enforceable.

17. Although a CBA is a contract between an employer and a trade union, it affects more persons than these two parties. In addition to the two, the instrument also affects unionisable employees who work for the employer and who fall within the sector where the trade union is licensed to operate (see section 59 (1) (b) of the *Labour Relations Act*).

18. Looked at from this perspective, there is a sense in which CBAs constitute special forms of contracts. Besides being contracts in the ordinary sense of the word, CBAs acquire the status of quasi-statutory instruments once they are registered.

19. Once a CBA is registered, its terms are automatically infused into the contracts of the employees it is meant to benefit. As such, it becomes part of the terms and conditions of service of the employees who are affected by it.

20. For purposes of this discourse, it is perhaps necessary to point out that the term ''unionisable employee'' denotes more than the employees who are members of a particular trade union. It includes those who are eligible to be members of the union but who have opted not to join it. This group of employees still enjoy the benefits that flow from a CBA that has been concluded between the employer and the trade union in return for the said employees paying agency fees to the trade union.

21. The foregoing demonstrates that when the employer decides to terminate a CBA, his action will impact not just the trade union involved and its members but also employees who are benefiting from the CBA without being union members. As such, cancellation of the instrument should be handled with a measure of circumspect.

22. Importantly, once the terms of a CBA are incorporated into the individual contracts of service for unionisable employees, it (the CBA) cannot be revised or annulled without the involvement of the individual employees in consultation with the trade union. This is because by virtue of section 10 (5) of the *Employment Act*, an employer cannot alter the terms and conditions of a contract of service without consulting the affected employee and reducing any agreement that is reached on the alteration into writing.

23. The net effect of the foregoing is that once a CBA is registered, the employer cannot simply walk away from it. He can only relieve himself of the obligations under the instrument through a consultative process with the trade union and the employees whose contracts will be affected by its cancellation. This is because cancellation of the instrument will directly impact on the employees' accrued rights and terms and conditions of service.

24. The Respondent contends that the CBA between the parties suffered frustration due to the fiscal challenges it has been experiencing. As such, it cannot be implemented.

25. Frustration of a contract normally arises when a supervening event renders performance of the contract impossible or only possible in a very different way from that which the parties had contemplated without the default of either of them. The event must be shown to have been beyond the control and contemplation of the parties.

26. A contract can only be said to be frustrated if the supervening event cannot be blamed on either of the parties to the contract. Some of the events that may frustrate a contract include: a fire that destroys the subject matter of the contract; a storm; changes in the law; and death.

27. Frustration cannot be inferred from matters which were foreseeable. It will also not be inferred where the event in question merely makes performance of the contract more onerous (see Dormakaba Limited v Architectural Supplies Kenya Limited (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment)).

28. Having regard to the above parameters of the doctrine, I do not think that what befell the Respondent falls in the category of what amounts to a frustrating event for a contract. I say so because whether a business is able to make profits is a matter which can be projected using expert analysis. Consequently, had the Respondent engaged the services of finance and business advisers, it would have been able to project whether the profits it made in 2021 were sustainable. As such, I do not think that the dip in its (the Respondent's) profits after 2021 was an event that was entirely unforeseeable.

29. Importantly, once the Respondent realized that its profit margins had begun to plummet, it was free to take steps to try and reverse the trend by for instance restructuring its business through downsizing and rationalization of staff. In effect, it was within the Respondent's powers to reorganize its business in reaction to the fiscal challenges it was facing.

30. As such, I do not think that it is open to it (the Respondent) to contend that the events which led to plummeting of its profits were beyond its control and thus justify the setting up of the defense of frustration. In my view, the Respondent's economic challenges only made implementation of the CBA more onerous.

31. In discounting the notion that every challenge that is encountered in the process of implementing a contract amounts to a frustrating event, the High Court in Dormakaba Limited v Architectural Supplies Kenya Limited (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment) expressed itself as follows with reference to financial challenges:-

> " It's important to note that not all disappointments lead to frustration. Financial hardship to a party is not enough nor is it a ground to invoke the doctrine of frustration."

32. A similar finding was made in the case of Banking Insurance & Finance Union v Kenya Bankers Association [2021] eKLR where the learned trial Judge observed as follows:-

> " A dip in the profits of an entity, in this case a bank, does not imply frustration.
>
> It is my finding that the doctrine of frustration of contract is inapplicable in the circumstances of this case."

33. Even assuming that the Respondent's financial challenges rendered it difficult for it (the Respondent) to implement the CBA, was it open to it (the Respondent) to simply sit by and plead helplessness every time the Claimant questioned the non-implementation of the instrument? I do not think so.

34. The CBA has inbuilt mechanisms to address challenges that may arise from its implementation. For example, clause 29 of the instrument gives either party the power to apply to amend it. As well, clause 20 grants the employer the option of declaring redundancies, a critical tool in restructuring of a business enterprise.

35. In my view, once the Respondent came to the realization that the economic challenges it was undergoing would render implementation of the CBA burdensome, it ought to have written to the Claimant requesting to revise the economic clauses in the instrument. There is no evidence that it (the Respondent) sought to utilize this inbuilt mechanism to ameliorate the adverse fiscal challenges it was experiencing.

36. It was also open to the Respondent to utilize the tool of redundancy to downsize in reaction to the fiscal challenges it had. There is no evidence that it did so.

37. The court has taken time to address the foregoing because the *Labour Relations Act* pursuant to which CBAs are entered into does not provide for mechanisms through which parties to the instruments may vary, review or rescind them (Kenya Airways Limited v Kenya Airliners Pilots Association [2013] KEELRC 569 (KLR)). Neither does it (the Act) contemplate a scenario where the court can issue an order which will render a CBA that has been registered a mere piece of paper. As such, it is left to the parties to provide for exit procedures from the instrument in recognition of the voluntary nature of the collective bargaining process.

38. Economic hardships notwithstanding, the power to vary or review a CBA in order to align it with the prevailing realities remains with the parties and not the court. Acknowledging this fact, George Ogembo in his publication titled ''Employment Law Guide for Employers'' 2nd Edition (at page 267) states as follows:-

> " Even in instances of economic hardships, the court cannot take over the rights of the parties to the collective agreement to negotiate and mutually agree on the modalities or a mutually accepted balance between the survival of the enterprise and protection of the rights of workers. Since the duty to engage in social dialogue is supreme, an employer cannot plead economic difficulties and then refuse to negotiate with the trade union or unilaterally vary the terms of the collective agreement. All the court can do in the circumstances is to encourage the parties to further negotiate and mutually agree on acceptable terms, in some instances, with its supervision."

39. From the foregoing, it is apparent that the court has no right to suspend implementation of a valid CBA on account of economic hardships on the part of the employer and force the parties to go back to the negotiating table to review the instrument. The parties must endeavor to find a middle ground through voluntary negotiations.

40. The best the court can do is to aid the process through supervision. However, it cannot impose terms on the parties.

41. The consequence of the foregoing is that during the process of negotiations to vary a CBA for whatever reasons, the instrument remains binding on the parties and they are expected to continue implementing it unless they have a contrary agreement. As such, in the instant case, whilst the parties are at liberty to seek to vary the impugned CBA, they are obligated to continue implementing it until such time that it will have been varied through consensus.

Determination

42. Having regard to the foregoing, I decline to find that the CBA between the parties was frustrated by the fiscal challenges which the Respondent was experiencing.

43. The CBA having been registered as per law provided, it remains binding on the parties and is enforceable in terms of section 59 of the *Labour Relations Act*.

44. Until the parties take steps to amend or annul the CBA, they are bound to implement it.

45. The Respondent is at liberty to utilize the inbuilt mechanisms in the CBA to address the fiscal challenges associated with it instead of hoping that the CBA will just go away.

46. As such, the court orders the Respondent to implement the impugned CBA unless and until the instrument is altered by agreement of the parties.

47. The court makes no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF MARCH, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI